83-131

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

ARTHUR FREDERICK GOODE, III.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND APPENDIX

JIM SMITH
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QUESTIONS PRESENTED

1. WHETHER A FEDERAL CIRCUIT COURT OF APPEALS MAY REJECT A STATE APPELLATE COURT'S FINDING OF FACT PURSUANT TO TITLE 28 U.S.C. § 2254 (d)(8), AS NOT BEING FAIRLY SUPPORTED BY THE RECORD AS A WHOLE, SIMPLY BECAUSE THE CIRCUIT COURT OF APPEALS DISAGREES WITH THAT FINDING.

2. WHETHER A FEDERAL DISTRICT COURT'S FINDING OF FACT, WHILE SITTING IN HABEAS, IS SUBJECT TO THE CLEARLY ERRONEOUS RULE OF RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

3. WHETHER, ONCE THE SENTENCING AUTHORITY IN A CAPITAL CASE FINDS ONE OR MORE VALID STATUTORY AGGRAVATING CIRCUMSTANCES TO EXIST IT IS CONSTITUTIONALLY IMPERMISSIBLE FOR THE SENTENCING AUTHORITY TO ALSO CONSIDER NON-STATUTORY AGGRAVATING CIRCUMSTANCES RELEVANT TO THE DEFENDANT'S CHARACTER AND PROPENSITY TO COMMIT MURDER.

4. WHETHER, GIVEN THE FACT THAT THE SENTENCING AUTHORITY MAY HAVE CONSIDERED AN IMPROPER AGGRAVATING FACTOR IN SENTENCING A DEFENDANT TO DEATH, A COURT OF APPEALS MAY SET ASIDE THAT SENTENCE AS ARBITRARY AND CAPRICIOUS WHERE THE FLORIDA SUPREME COURT INDEPENDENTLY REVIEWED AND REWEIGHED THAT SENTENCE AND DETERMINED IT TO BE PROPER EVEN ABSENT THE IMPERMISSIBLE AGGRAVATING CIRCUMSTANCES.

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OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit, is reported as 704 F. 2d 593, (11th Cir. 1982) and appears in the Appendix as A-1-188. Three relevant opinions of the Supreme Court of Florida are reported as Goode v. State, 365 So. 2d 381 (Fla. 1978), Goode v. State, 403 So. 2d 931 (Fla. 1981) and Goode v. Wainwright, 410 So. 2d 506 (Fla. 1982).

JURISDICTIONAL STATEMENT

The judgment of the Eleventh Circuit Court of Appeals was entered on May 2, 1983. A Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed and denied on June 15, 1983.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1234 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides:

AMENDMENT VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, inter alia:

AMENDMENT XIV.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On an early morning in 1976 a 10 year old male child was abducted on the way to school. He was subsequently found dead, nude and beaten in a wooden area. Respondent was arrested for this murder and indicted for murder in the first degree. He exercised his rights under Faretta v. California, 422 U. S. 806 (1975) and proceeded to represent himself, although the trial court appointed two public defenders as standby counsel to assist him throughout.

After the state rested its case respondent took the witness stand and testified, giving a detailed and graphic description of how he lured, tortured and finally, murdered the child, stating he did not feel any remorse whatsoever.

Naturally, the jury found him guilty. At the sentencing phase of the trial Goode again took the witness stand and testified that, if given the chance, he would murder another little boy. The jury recommended death.

Prior to sentencing, Mr. Wilbur C. Smith III., Goode's previously discharged attorney appeared and asked to make ". . . a statement which might be in mitigation of any sentence which the court is to impose."

Mr. Smith argued, in essence, that the death sentence would merely be symbolic, that little would be accomplished by executing Goode, and that he should be studied instead of executed.

The trial judge then announced his judgment that Goode be sentenced to death and dictated into the record his

findings as to aggravating and mitgating circumstances. He found three statutory aggravating: (a) that Goode had previously been convicted of another capital felony involving the use or threat of violence (b) that the murder was committed while Goode was engaged in kidnapping and sexual battery (c) that the murder was especially heinous, atrocious or cruel and that ". . . no other aggravating circumstances to have been proved beyond and to the exclusion of every reasonable doubt." He also found two mitigating: (a) that Goode had no significant history of criminal activity prior to the date of this murder [1] and (b) that Goode's age

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[1] Goode's other capital felony crime was committed after this murder.

was 22 at the time of the crime, but that ". . . the mitigating circumstances found to exist do not outweigh the aggravating circumstances found to exist . . ."

After sentencing Goode to death the trial judge proceeded to ". . . address myself to Counsel Smith's remarks . . ." stating:

> "The question of why should this man be executed for what he has done is a question that the Court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death. Could not something be learned from Arthur? Am I not doing as I have seen and heard many do and merely so outraged by the activities that he has done that possibly my reason and judgment are blurred? I believe not.
>
> If organized society is to exist with the compassion and love that we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no

> longer help, we can no longer rehabilitate and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate.
>
> Philosophically I believe that in certain limited instances we should do that. In this particular case that is my opinion, and that is my order, and the only answer I know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, main, torture or harm another human being, and as you said in trial, Arthur, maybe I don't know who we blame. God forgive you of those desires or something in your environment that has made you have them, and whoever is to blame is beyond the power of this Court.

The above remarks are the subject of this Petition for Writ of Certiorari. After exhausting his Florida remedies Goode sought habeas relief in federal court, where, eventually, as has become almost customary, the Eleventh Circuit granted habeas relief with respect to the sentence of death.

Labeling the judges remarks as the "recurrence" factor, the Eleventh Circuit held that they constituted an improper nonstatutory factor which had been considered by the trial judge in the sentencing process, rendering the death sentence constitutionally infirm.

The Florida Supreme Court in Goode v. Wainwright, 410 So. 2d 506 (Fla.1982) had found these statements not to have been considered by the judge in the sentencing process, but made in reply to attorney Smith's mitigating statement in explanation". . . of why the result of [the judge's] weighing process was proper." Id. 509.

Nevertheless, the Eleventh Circuit refused to apply 28 U.S.C.A. 2254 (d), ruling that Florida Supreme Court's findings were not fairly supported by the record as a whole. The Eleventh

Circuit reasoned:

> "Although the judge's remarks were made chronologically after he had announced the death sentence, the words used by the judge indicate clearly that the judge was reflecting on his decision-making process of the last few days:
>
> Goode v. Wainwright, 704 F. 2d at 607.

The Court also rejected the district judge's findings that the remarks were simply a philosophical justification of capital punishment. Goode v. Wainwright, 704 F. 2d at 606, footnote 15.

The court then reasoned that the sentence of death imposed in Goode's case was arbitrary and capricious because Goode would be the only capital defendant sentenced to death in Florida through a consideration of this "recurrence" factor.

The court's reasoning was premised on the fact that, although this "recurrance" factor could be an appropriate aggravating circumstnace, the Florida legislature had not designated it as such, Id. 608 footnote 18; moreover, that the Florida Supreme Court in Miller v. State, 373 So. 2d 882 (Fla. 1979) had held it to be an improper factor to consider in the weighing process. Thus, reasoned the Eleventh Circuit, since the Florida Supreme Court had held that consideration of such a "recurrance" factor, in the weighing process, impermissible, Goode would be the only man sentenced to die in Florida through a consideration of this factor. This would constitute, reasoned the court, an arbitrary and capricious imposition of the death sentence.

Not only did the Eleventh Circuit reject the Florida Supreme Court's distinctional analysis between what occurred in the Miller case and in Goode's case, Goode v. Wainwright, 410 So. 2d 506 (Fla. 1982), but refused even to await the Barclay and Zant decisions, Barclay v. Florida, 74 L. Ed 2d 382 (1982), 74 L. Ed 2d 503 (1982) because ". . . neither case challenges a death sentence which was imposed in reliance on an aggravating factor which the state procedures themselves forbid . . ."nor" . . .involves the proposed execution of a defendant notwithstanding that all others in the

state would have been entitled to re-sentencing under the circumstances" Goode v. Wainwright, 704 F. 2d 593 613, (11th Cir. 1983), footnote 26.

On rehearing Petitioner suggested to the Eleventh Circuit that it had overlooked the fact that the Florida Supreme Court not only reviews all death sentences but reweighs them to determine, independently, whether the sentence of death is warranted. Consequently, even where the sentencing authority impermissibly considers a factor in the sentencing process, that sentence cannot be considered arbitrary and capricious if the Florida Supreme Court reviews the sentence and determines independently, after eliminating

all impermissible factors, that the sentence is proper. In Goode's direct appeal the Florida Supreme Court in weighing the sentence of death had said:

> "Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is in the proper sentence."
>
> Goode v. State, 365 So. 2d 381, 384-385 (Fla. 1979)
>
> (emphasis supplied)

A. REASONS FOR GRANTING WRIT

(1) Question One Involves an Issue of great importance in the administration of habeas corpus proceedings in federal court.

(2) Question One involves an issue which has a great impact on the strained relationships between federal and state courts.

(3) The Eleventh Circuits answer to Question One is in direct and irreconcilable conflict with decisions of the Supreme Court of the United States.

Recently, this Court refined the standard by which a circuit court of appeals may disregard a finding of fact made by a state appellate court pursuant to Title 28 U.S.C.§2254 (d)(8) as not being fairly supported by the record as a whole. Sumner v. Mata, 449 U.S. 539 (1981), Marshall v. Lonberger, 74

L. Ed. 2d 646 (1983), Maggio v. Fulford, 33 Cr. L. 4075 (1983).

It is patently obvious that the decision of the Eleventh Circuit in the instant case has failed to apply those standards.

In the instant case the Florida Supreme Court found that this "recurrence" factor was not considered in the sentencing weighing process. The District Court agreed. The Eleventh Circuit rejected this finding, not because the finding was clearly erroneous, nor because there was no support in the record, nor because it was a mixed question of law and fact, but because it disagreed with the Florida Supreme Court. This is manifest because, as the Eleventh Circuit recognized, the judge's comments

which constituted this "recurrence" factor occurred after the judge had weighed the statutory aggravating and mitigating factors and had imposed the sentence of death. The Eleventh Circuit disagreed simply because it found in the judge's comments an indication that he had been thinking about this matter for some two weeks prior to imposing sentence.

The Florida Supreme Court had said that the statements made by the judge were not part of the weighing process, but that after

> ". . . the trial judge imposed the sentence and, in reply to statements made by attorney Smith, explained why the result of the weighing process was proper."
>
> Goode v. Wainwright, 410 So. 2d at 509.

The Eleventh Circuit rejected this conclusion as being fallacious because

> "[i]t is logically impossible to say that the death penalty is proper because of the recurrence factor and to simultaneously say that the factor was not considered."
>
> Goode v. Wainwright, 704 F. 2d at 605.

The Eleventh Circuit's decision conflicts with Marshall, supra not only by virtue of the fact that it's conclusion is nothing more than an argumentative disagreement with the Florida Supreme Court, but because it fails to conclude that the state court finding lacked even fair support in the record. This finding it could not make since it recognized, as it had to, that

> ". . . the judge's remarks were made chronologically after he had announced the death sentence. . ."
>
> Goode v. Wainwright, 704 F. 2d at 607.

The reason the Eleventh Circuit disagreed is because it found record support for its factual conclusion in the trial judge's statement that he had been thinking about the matter for the last several days. We believe and suggest that this case calls for a summary reversal, [1] but regardless, certiorari is necessitated in order for this Court to once again clearly and unequivocally instruct that a federal court may not reject a state factual finding simply because it finds record support for a contrary conclusion.

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[1] The Eleventh Circuit cannot claim not to have had the benefit of Marshall because Marshall was decided February 22, 1983, whereas Goode decided three months later.

Moreover, the lower court ignored the findings of the district court. Maggio suggests those findings carry some weight with respect to §2254 (d)(8). We suggest that whenever a district court approves a state court finding, that approval, to the extent that it is a factual finding, should itself be subject to the clearly erroneous rule. See Rule 52 (a) Federal Rules of Civil Procedure. All of which leads to Question Two.

(4) In Question Two we ask whether a District Court finding of fact is subject to the clearly erroneous rule.

The Eleventh Circuit holds that it is not. In the instant case the district judge, in finding that the state trial judge's statements were not part of the weighing process concluded:

"Taking these remarks completely out of context, the Petitioner now argues that the judge improperly considered a nonstatutory aggravating factor, i.e., the possibility that the Petitioner might kill again in the future. As demonstrated, the record simply does not support this claim. The sentence was properly imposed in the structured manner the statute requires. The court's subsequent remarks were made in response to counsel and in philosophical justifications of capital punishment both generally and as applied in Petitioner's case. It would be a gross distortion to conclude on that basis that the statute was not obeyed."

(A-143-144)

It is clear that the district judge reached the same conclusion on the basic ultimate fact as did the Florida Supreme Court; viz: that this "recurrence" factor was not considered in the weighing process. The Eleventh Circuit rejected this conclusion even though it cannot be said to be clearly erroneous. Footnote 15, Goode v. Wainwright, 704 F. 2d at 606. This court has held that ultimate facts are subject to the clearly erroneous rule of 52 (a) even though they may be based on documentary evidence. Pullman v. Swint, 72 L. Ed 2d 66 (1982).

Here again, we believe that the Eleventh Circuit's decision should be summarily reversed for failing to comply with the clearly erroneous standard

of Rule 52 (a). As with Marshall the Eleventh Circuit cannot claim not to have had the benefit of Pullman, as Pullman was decided over a year before the Eleventh Circuit decided Goode.

(5) Questions Three and Four are important issues in the administration of capital cases, they involve recurring problems and the Eleventh's Circuit decision with respect to them conflicts with the decision of this Court in Proffitt v. Florida, 428 U.S. 242 (1976), Zant v. Stephens, 33 Cr. L. 3195 (1983) and Alabama v. Evans, 75 L. Ed 2d 806 (1983).

In question three we ask this Court to answer the question as to whether, once the sentencing authority in a capital case finds one or more valid statutory aggravating circumstances to exist, it is

constitutionally impermissible to also consider non-statutory aggravating circumstances relevant to the defendant's character and propensity to commit murder.

It is important for those engaged in the sentencing process to know whether they can ever consider such factors. Certainly, as the Eleventh Circuit recognized in the instant case, a defendant's propensities to commit murder is a most relevant matter in capital sentencing. Goode v. Wainwright, 704 F. 2d at 608 footnote 18. If non-statutory mitigating factors pertaining to the defendant's character are relevant Lockett v. Ohio, 438 U.S. 586 (1978) we fail to see why non-statutory factors, also pertaining to the defendants character or propensities, for murder may not also be considered.

The importance of this recurring question is amply demonstrated by citing a few of the cases in which it or a similarly related question has been answered. Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980) cert. granted, 70 L. Ed 2d 82 (1981), question certified Zant v. Stephens, 72 L. Ed 2d 222 (1982) decided, Zant v. Stephens, 33 Cr. L. 3195 (1983), Henry v. Wainwright, 661 F. 2d 56 (5th Cir. 1981), cert. granted, judgment vacated, 73 L. Ed. 1326, but see Henry v. Wainwright, 686 F. 2d 311 (5th Cir. 1982), Williams v. Maggio, 679 F. 2d 381 (5th Cir. 1982), Martin v. Louisiana, 449 U.S. 998 (1980), Drake v. Zant,449 U.S. 999 (1980), Westbrook v. Balcom, 449 U.S. 999 (1980), Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982). Moreover, in Barclay v. State, 74 L. Ed. 2d 382 (1982) and

Zant v. Stephens this court, by granting certiorari indicated that it was resolving this or, at least a closely related issue.

We believe that the Eleventh Circuit's answer to question three conflicts with what this Court said in Proffitt v. Florida, 428 U.S. 252 (1976) and this court's recent decisions in Zant v. Stephens, 33 Cr. L. 3195 (1983). In Proffitt v. Florida, 428 U.S. 242 (1976) this court was clearly aware that at least one of the aggravating factors found by the trial court was non-statutory. Yet in footnote 13 of Proffitt v. Florida this court indicated it was not fatal.

More recently, in Zant v. Stephens, decided June 22, 1983, this court held that once valid statutory aggravating circumstances identify a defendant as

being within the class of persons eligible for the death penalty, the constitution does not prohibit consideration of non-statutory factors as long as those factors themselves are not constitutionally prohibited. Even the Eleventh Circuit recognized that the "recurrence" factor, allegedly considered in the instant case would not be constitutionally impermissible.

Moreover, as to question four the decision of the Eleventh Circuit conflicts with the decision of Proffitt v. Florida, and, additionally, with this Court's recent decisions in Zant v. Stephens, 33 Cr. L. 3195 (1983), Alabama v. Evans, 75 L. Ed 2d 806 (1983).

In Proffitt v. Florida, this court emphasized that under Florida's sentencing procedures any risk of arbitrariness and capriciousness is mini-

mized by the fact that the Florida Supreme Court reviews and reweighs a sentence of death to determine, independently, whether that sentence is proper. Which is exactly what the Florida Supreme Court did in the instant case:

> "Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case sub judice, our judgment is that death is the proper sentence.
>
> Goode v. State, 365 So. 2d 381-384-385, (Fla. 1979).

Consequently, even assuming arguendo, the trial judge improperly considered this "recurrence" factor in sentencing, the Florida Supreme Court reviewed that sentence and independently, after reweighing found it to be proper minimizing, in the process,any possibility that the sentence was imposed arbitrarily or capriciously.

Similarly in Alabama v. Evans, this Court, in vacating a stay of execution, indicated that when the highest court of a state weighs the aggravating and mitigating circumstances independently, and approves the sentence of death, arbitrariness or capriciousness in the sentence will seldom be questioned.

Finally in Zant v. Stephens this court emphasized several times in its opinion that review of the death sentence by the highest appellate court in the state was an important procedural safeguard that minimized any possibility of capriciousness and arbitrariness. The Eleventh Circuit's decision in the instant case disregards the impact of this appellate review.

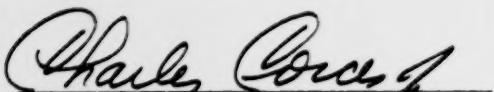
Thus question four requires resolution, irrespective of whether the answer to issue three is in the affirmative.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant Certiorari and reverse the holding of the Eleventh Circuit of Appeals.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL



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COUNSEL FOR RESPONDENT

I, CHARLES CORCES, JR., Counsel for Petitioner, and member of the Bar of the United States Supreme Court, hereby certify that on the 26 day of July 1983, I served three copies of the Petition for Writ of Certiorari on Wilbur C. Smith, III, Smith, Carta, Ringsmuth & Kluttz, P. O. Box 2446, Fort Myers, Florida 33902-2446, by a duly addressed envelope with postage prepaid.

Charles Corces

CHARLES CORCES, JR.
Assistant Attorney General

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ARTHUR FREDERICK GOODE, III,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT,

Respondent-Appellee.

No. 82-5244

United States Court of Appeals,
Eleventh Circuit

May 2, 1983.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge and HOFFMAN*, District Judge.

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*Honorable Walter E. Hoffman, U. S. District Judge for the Eastern District of Virginia, sitting by designation.

R. LANIER ANDERSON, III, Circuit Judge:

Appellant Arthur F. Goode, III is Florida prisoner under the sentence of death. He seeks habeas corpus relief pursuant to 28 U.S.C.A. §2254 (West 1977). The district court denied any relief. We affirm in part, reverse in part, and remand.

HISTORY OF THE CASE

[1] Goode was found guilty by a jury of the gruesome killing of Jason Verdow, a boy ten years of age. Goode was convicted of first degree murder and sentenced to death. On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. *Goode v. State*, 365 So. 2d 381 (Fla. 1978), *cert. denied*, 441 U. S. 967, 99 S. Ct. 2419, 60 L. Ed 2d 1074 (1979). Goode then filed a motion to vacate the judgment

and sentence pursuant to Fla. R. Crim. P. 3.850, alleging various constitutional violations in the guilt and penalty phases of his trial. The Florida Supreme Court affirmed the denial of this motion. *Goode v. State*, 403 So. 2d 931 (Fla. 1981). During this time, Goode joined with others in filing in the Florida Supreme Court a habeas action, alleging that the Florida Supreme Court had improperly received and considered extra-record materials in deciding the petitioners' direct appeals from their convictions and death sentences. The Florida Supreme Court denied relief. *Brown v. Wainwright*, 392 So. 2d 1327 (Fla.), *cert denied*, 454 U.S. 1000, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981). Goode then filed another habeas action in the Florida Supreme Court, alleging ineffective assistance of appellate counsel on his direct appeal. The Florida

Supreme Court denied relief. *Goode v. Wainwright*, 410 So. 2d 506 (Fla. 1982). Goode filed the instant petition for writ of habeas corpus in federal district court. The district court dismissed the petition, granted a certificate of probable cause for appeal, but denied a motion for a stay of execution pending appeal. This court granted Goode's motion for a stay of execution. *Goode v. Wainwright*, 670 F. 2d 941, 942 (11th Cir. 1982). After delaying decision in this case pending the decision in our en banc case, *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983), we now consider the merits of Goode's appeal.[1/]

1/ Not all of Goode's claims have been exhausted in state court. The district court here rendered its decision two months before *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L. Ed 2d 379 (1982), was decided. We do not need to address whether Rose's exhaustion requirements apply retroactively in this

ISSUES

The case presents eight issues: (1) Goode's competence to stand trial, (2) Goode's competence to waive trial counsel, (3) Goode's waiver of his right to trial counsel, (4) the trial court's general conduct of the trial, (5) the jury instructions concerning mitigating circumstances, (6) the trial court's failure to recite certain statutory and nonstatutory mitigating circumstances, (7) the Florida Supreme Court's alleged receipt and consideration of extra-record materials in deciding Goode's direct appeal, and (8) the trial court's

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case, See *Johnson v. Balkcom*, 695 F. 2d 1320 (11th Cir. 1983), because the state has waived the exhaustion issue by failing to raise it. *Lamb v. Jernigan*, 683 F. 2d 1332, 1335 n. 1 (11th Cir. 1982) (decided after Rose), cert. denied_____ U.S._____, 103 S. Ct. 1276, 74 L. Ed. 2d_____(1983).

alleged consideration of a nonstatutory factor in sentencing Goode to death.

After careful consideration, we reject the first seven claims asserted by Goode, but we find merit in the final claim and accordingly reverse.

I. COMPETENCE TO STAND TRIAL

Goode contends that the pretrial hearing on his competence to stand trial was inadequate. He argues that a more in-depth analysis of his mental condition was needed, including more tests, long-term observations, and follow-up examinations. We conclude that the pretrial competency hearing was adequate.

If a bona fide doubt exists as to the defendant's competence to stand trial, the defendant has a due process right to a hearing on that issue. *Reese v. Wainwright*, 600 F. 2d 1085, 1091 (5th Cir.), cert. denied, 444 U.S. 983, 100 S.Ct.

487, 62 L. Ed. 2d 410 (1979); [2] *Pedrero v. Wainwright*, 590 F. 2d 1383, 1387 (5th Cir.), cert. denied, 444 U.S. 943, 100 S. Ct. 299, 62 L. Ed. 2d 310 (1979); *Davis v. Alabama*, 545 F. 2d 460, 464 (5th Cir.) cert. denied, 431 U.S. 957, 97 S. Ct. 2682, 53 L. Ed.2d 275 (1977); See *Drope v. Missouri*, 420 U.S. 162, 172-73, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975) (approving state law requirement of "reasonable cause to believe" defendant incompetent); *Pate v. Robinson*, 383 U.S.

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[2] In *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981)(en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business of September 30, 1981. Id at 1209.

375, 385, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966) (approving state law requirement of "bona fide doubt" as to competence). The test for competence to stand trial is whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and whether the defendant possesses a rational and factual understanding of the proceedings against him. *Drope v. Missouri*, 420 U.S. at 172, 95 S. Ct. at 904 (1975); *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L. Ed. 824 (1960); *Pride v. Estelle*, 649 F. 2d 324, 326 n. 4 (5th Cir. June 30, 1981); *Reese v. Wainwright*, 600 F. 2d at 1090-91.

[2] At Goode's competency hearing, four psychiatrists testified. Three of them had been appointed by the trial

court, and one obtained by Goode. The three appointed psychiatrists explicitly testified that, in their opinions, Goode met the test for competence to stand trial. Goode's psychiatrist testified that he did not meet the test. The three appointed psychiatrists filed written reports with the trial court, while Goode's psychiatrist detailed his findings in his testimony. Each of the psychiatrists interviewed Goode personally. 3/ Each read at least the

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3/ Dr. Barnard, the psychiatrist called by Goode's attorneys, had conducted a lenghthy examination of Goode and had made a comprehensive evaluation. Each of the three court-appointed psychiatrists examined Goode twice. Dr. Than's first examination took about three and a half hours; his second about two and a half hours. Dr. Haber's first examination was extensive, and his second took about two hours. Dr. Wald also examined Goode twice and was satisfied that he had adequate information upon which to base his opinion.

relevant parts of an exhaustive, 187-page report on Goode's educational, psychological, familial, and criminal background, which was completed less than a year before Goode's Florida trial. The psychiatrists were satisfied that they had sufficient information to reach an opinion as to Goode's competence. Under these circumstances, we hold that Goode received an adequate hearing on the issue of his competence to stand trial.

II. COMPETENCE TO WAIVE TRIAL COUNSEL

Goode contends that the trial court improperly failed to conduct a separate hearing on his competence to waive trial counsel, in addition to the hearing on his competence to stand trial. Goode also argues that the test for competence to waive counsel differs from the test for competence to stand trial, and that

the trial court applied the wrong test. We conclude that the trial court conducted an adequate inquiry into Goode's competence to waive counsel under the very test urged by Goode.

[3] Contrary to Goode's assertions, the trial court was not required to conduct a separate and distinct hearing on Goode's competence to waive trial counsel. In *Westbrook v. Arizona*, 384 U.S. 150, 86 S.Ct. 1320, 16 L. Ed 2d 429 (1966), the Supreme Court observed that

> Although petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing *or inquiry* into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense.
>
> Id. (emphasis added).

Three of the four psychiatrists specifically addressed Goode's desire to discharge his attorney and represent himself. The trial court itself questioned one of the psychiatrists as to whether Goode's desire to waive his right to trial counsel and to represent himself was a "rational, logical judgment" that was not "substantially affected by any mental illness or mental disorder." The trial court also asked the psychiatrist whether Goode would be able to "comprehend and understand the significance" of the M'Naghten Rule, which relates to the insanity defense. Further, the trial court asked

> If I explained to him [Goode] trial tactics, his right to remain silent, for instance, the right of defense of insanity, how it's presented, how it could be used, both tactically and factually, could he understand and appreciate what I as the Judge or a lawyer were telling him?

Trial Transcript at 917, *Florida v. Goode*, No. 76-671 (Fla. Cir. Ct. 1977) [hereinafter cited as Trial Transcript]. Essentially, the trial court inquired into whether Goode's mental condition permitted him to make an informed judgment as to whether he should waive his right to counsel, and as to how to conduct his own defense. The psychiatrist responded affirmatively to all of the trial court's questions. In our view, the trial court here conducted an adequate inquiry into Goode's competence to waive trial counsel.

[4] Goode also argues that the trial court did not apply the proper test in determining whether Goode was competent to waive trial counsel. According to Goode, the test is as follows;

> [W]hether [the defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Rees v. Peyton, 384 U.S. 312,314, 86 S. Ct. 1505, 1506, 16 L.Ed 2d 583 (1966). We need not and do not decide whether the *Rees* test, which related to a defendant's desire to withdraw his petition for certiorari, applies to the issue of competence to waive counsel.

Assuming *arguendo* that the *Rees* test does not apply here, we fail to understand Goode's complaint. The trial court in fact applied the very test urged by Goode. As discussed earlier, the trial court questioned one of the psychiatrists as to whether Goode's desire to waive trial counsel was a

rational, logical judgment not substantially affected by any mental disorder. In addition, the trial court asked whether Goode was able to comprehend and understand the significance of the proceedings, especially his various fundamental constitutional rights. In our view, this questioning indicates that the trial court adequately determined that Goode had the capacity to make a rational choice and that his decision to waive counsel was not substantially affected by any mental deficiency. Accordingly, we reject Goode's argument that the trial court did not apply the proper standard.

III. WAIVER OF TRIAL COUNSEL

[5] Goode contends that the trial court improperly concluded that Goode knowingly and intelligently waived his right to trial counsel. This issue is different from the issue of Goode's competence to waive trial counsel, in that it focuses on the circumstances of the waiver itself, once competency has been established. We conclude that Goode knowingly and intelligently waived his right to trial counsel.

In support of his argument, Goode relies on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed 2d 562 (1975), in which the Supreme Court recognized that a criminal defendant has a Sixth Amendment right to self-representation. Acknowledging that the exercise of such right involves the relinquishment of the obvious benefits of

trial counsel, the Supreme Court held that a defendant desiring to represent himself must knowingly and intelligently waive his right to counsel. Id at 835, 95 S. Ct. at 2541; accord, *Brown v. Wainwright*, 665 F. 2d 607, 610 (Former 5th Cir. 1982) (full bench en banc); [4/] *United States v. Chaney*, 662 F. 2d 1148, 1152 (5th Cir. Dec. 7, 1981)(Unit B).

First, contrary to his assertions, Goode "clearly and unequivocally" stated to the trial court that he wanted to represent himself and that he did not want

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4/ In *Stein v. Reynolds Securities, Inc.*, 667 F. 2d 33 (11th Cir. 1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of the full bench of the former Fifth Circuit or of Unit B. Id at 34.

representation by counsel. Second, Goode was adequately made aware of the "dangers and disadvantages" of self-representation. Goode was fully aware that his conviction could result in the death sentence. The trial court's manner of impressing the dangers of self-representation on Goode was to ask him a series of technical legal questions, pertinent to Goode's case, and concerning the elements of first degree murder in Florida, the voir dire examination of jurors, the purpose of opening and closing arguments, the order of proof in a criminal trial, and the method of presenting testimony. [5/] After Goode

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[5/] Although these questions were sufficient to impress upon Goode the value of legal representation, and the dangers of self-representation, we note that "technical legal knowledge, as such, [is] not relevant to an assessment of [a defendant's] knowing exercise of the right to defend himself." *Faretta v. California*, 422 U.S. at 836, 95 S.Ct. at 2541 (emphasis added).

repeatedly responded that he did not understand these questions, the trial judge informed him that his lack of understanding was the reason why he needed an attorney to explain these points to him. The trial judge further stated to Goode that an attorney's obligation is to advise a defendant what the law is.

The clear import of this exchange between Goode and the trial court as in *Faretta*, was to warn Goode that it was a mistake not to accept the assistance of counsel, and also that Goode would be required to follow the "ground rules" of trial procedure. 422 U.S. at 835-36, 95S. Ct. at 2541. Finally, as in *Faretta*, the record affirmatively demonstrates that Goode was competent and understanding and that Goode "voluntarily exercised his informed free will." I.d. at 835, 95 S.Ct.

at 2541. In addition, we note that, although Goode desired to represent himself, the trial court, in an abundance of caution, appointed stand-by counsel, who, at various points during the trial, advised Goode on how to proceed and conducted significant portions of Goode's defense. See id. at 834 n. 46, 95 S.Ct. at 2541 n. 46 (state may appoint stand-by counsel, even over accused's objection).

Accordingly, we hold that Goode knowingly and intelligently waived his right to trial counsel.

IV. GENERAL CONDUCT OF THE TRIAL

[6] Goode contends that his fundamental due process right to a fair trial was denied by the trial court's alleged general mismanagement of the trial proceedings. Goode points to several aspects of his trial in this regard,in-

cluding the pretrial publicity, the trial court's denial of a change of venue, the hybrid form of representation whereby both Goode and his standby counsel were involved in his defense, the press coverage during the trial (the jury was not sequestered), and Goode's mid-trial press conference in which he confessed to the murder. After a careful review of the record, we reject Goode's challenge.

We have reviewed the evidence in the record concerning the pretrial publicity and the voir dire. We are satisfied from the voir dire record that no bias or prejudice from pretrial publicity entered the jury room. Although most of the jurors had read or heard about the case, either they had read about it only at the time of the crime almost a year earlier, or their recollection of the

publicity was vague, or the record otherwise suggests that the publicity had very little influence. Thus, we conclude that the pretrial publicity did not deny Goode a fundamentally fair trial.

[7] We have grave doubts concerning the wisdom of permitting Goode to conduct a press conference during a recess on the first day of the trial, especially because the jury was not sequestered. However, the trial judge did give the jury forceful instructions not to talk about the case with anyone, not to permit anyone to talk to them, and most significantly, not to read, listen or to watch any news reports of the trial. Nothing in the record suggests that any juror disobeyed these instruction; nothing in the record suggests that any

juror even knew of or was influenced by Goode's news conference. Moreover, there is affirmative evidence in the record that the jury did in fact comply with the judge's instructions not to read, listen to, or watch any news accounts. An article appeared in the morning paper of March 16, 1977. The trial judge asked if any of the jurors had read or heard any news accounts, and received a negative response. We cannot conclude that the press coverage during the trial or Goode's press conference rendered the trial fundamentally unfair.

[8] Goode complains that the hybrid form of representation, whereby both Goode and his appointed counsel participated in the defense, created confusion at the trial and prejudice. Contrary to Goode's argument, the record demon-

strates that the conduct of the trial was orderly and nonprejudicial. Goode was afforded his constitutional right of self-representation in a context in which he had readily available the assistance of competent trial counsel. In fact, the two appointed public defenders conducted most of the trial in traditional fashion with Goode's apparent consent. The principal departures from tradition were first, the fact that Goode retained a right to approve trial decisions on a continuing basis, and second, the fact that Goode himself cross-examined witnesses and made a short closing argument. Goode's personal participation was with one exception, orderly and respectful. The single exception occurred following the testimony of Billy Arthes, the 11 year old boy who testified that he was in Goode's company for several days

shortly after Jason Verdow's murder and who testified that Goode told him that he, Goode, had killed Verdow. After Arthes' testimony was complete, Goode handed him a piece of candy and said: "I love you, Billy. Good bye." The trial judge's handling of the matter was forceful, effective and appropriate. He called recess for coffee, and forcefully reprimanded Goode out of the presence of the jury. There is no indication in the record that the jury was even aware of the trial judge's displeasure. The judge's warnings to Goode were obviously effective because Goode's actions thereafter were unobjectionable. During the hearing on the motion for a new trial, the trial judge described Goode's conduct at the trial and the foregoing incident as follows:

> [H]is questions were pertinent, and excepting one incident he was very proper and gentlemanly in the courtroom and there was a courtroom-type atmosphere . . . and I am further satisfied in regard to that one incident that he was competent and wanted to do it and did it.

Trial Transcript, at 1294-95.

Without question, it is out of the ordinary for a defendant to participate as co-counsel in his own defense. However, *Faretta v. California, supra,* specifically sanctions such participation. Goode's conduct in this particular case, as the trial judge found, was entirely appropriate with one fleeting and relatively minor exception.

[9] The more significant factor rendering this case unusual is the fact that Goode, although he declined to plead guilty, systematically and cleverly brought out evidence to assure his own

conviction, testified in gory detail as to his guilt, and argued to the jury that he should be convicted and sentenced to death. We have carefully pondered this disturbing feature. However, we are not prepared to hold that a defendant who confesses guilt, but is unwilling to enter a guilty plea is not entitled to a trial. Viewed from another perspective, to so hold would provide a shield from conviction for anyone who confesses guilt, but declines to plead guilty. Moreover, in a death penalty case, as here, there can be no consent judgment of death. Therefore, even if Goode had entered a guilty plea, there would still have to be a trial to determine the sentence. Our conclusion that there is no per se obstacle to a trial, where the defendant confesses his guilt and affirmatively seeks a jury verdict of guilty is sup-

ported by the instant case. Despite its peculiar character, the trial was conducted in an atmosphere of order and dignity.

For the foregoing reasons, we conclude that the general conduct of the trial did not deprive Goode of his due process right to a fundamentally fair trial. 6/

6/ While we conclude that the unusual feature of Goode's attempt to convict himself and to assure his own death sentence do not render the trial fundamentally unfair, we acknowledge these as facts raising serious doubts as to Goode's competence. However, the psychiatrists who examined Goode were forewarned of Goode's intentions, and took them into consideration in evaluating his competence. Three of the four examining psychiatrists nevertheless found Goode to be competent. After full, fair and adequate hearing, the state trial judge found that Goode was competent. We agree with that finding.

V. JURY INSTRUCTIONS ON MITIGATING CIRCUMSTANCES

[10] Goode contends that in the sentencing phase of his trial, the trial court's instructions improperly restricted the jury's consideration of mitigating circumstances to those statutory mitigating circumstances enumerated in Fla. Stat. Ann. §921.141 (6) (West Supp. 1982). 7/

7/ The trial court's instructions provide in pertinent part:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence . . . [the aggravating circumstances were then read, along with some definitions of terms]. Those are the aggravating circumstances . . . Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the

The State responds that Goode's argu-

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evidence, are these:. . . [the seven statutory mitigating circumstances were then read]. Those are the mitigating circumstances. Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proved to the exclusion of and beyond a reasonable doubt. Evidence tending to establish such an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the events should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

Trial Transcript, at 1248-55

ment is barred from federal habeas review by Goode's failure to object to the jury instructions at trial. 8/ We disagree with the State.

Under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L. Ed 2d 594 (1977), the failure to make a contemporaneous objection, when required by state procedural rules, generally bars federal habeas review, absent a

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8/ The State also argues that there was a second procedural default, i.e. Goode's failure to raise the limitation on mitigating circumstances issue on direct appeal. We need not address this issue since we agree with the State that Goode's federal habeas review of this issue is barred by his procedural default at trial.

showing of both cause and prejudice.[9/] The parties concede that Goode did not comply with Fla. R.Crim. P. 3.390(d) (West 1977), which requires a contemporaneous objection to allegedly erroneous jury instructions. Goode argues only that his failure to object *at trial* is excused for "cause" under *Sykes*, because *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978), was not decided until after Goode was sentenced. Because *Sykes* requires a showing of both cause *and* prejudice, and because we conclude that Goode has failed to satisfy

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[9/] With respect to other issues discussed in this opinion the State has waived *Sykes* objections by failing to raise them. *Washington v. Watkins*, 655 F. 2d 1346, 1368 (5th Cir. Sept. 14, 1981), *cert denied*, ____ U.S. ____, 102 S.Ct. 2021, 72 L. Ed. 2d 474 (1982). For example, see note 25, *infra*.

the prejudice prong, we need not determine whether the cause prong has been met. *Ford v. Strickland*, 696 F.2d 804, 812 (11th Cir. 1982) (en banc).

[11] The instant case is controlled by *Ford v. Strickland, supra*. There the en banc court addressed the prejudicial effect of a jury instruction limiting mitigating circumstances, which closely parallels the instruction in this case. As an alternative ground for decision, Judge Roney and five other judges (Judges Hill, Fay, Vance, Johnson and Henderson) joined Chief Judge Godbold's concurring opinion in concluding that Ford had failed to establish that the instructional error worked to his *actual and substantial disadvantage* as required by *United States v. Frady*, 456 U.S. 152, 171, 102 S.Ct. 1584, 1596, 71 L. Ed 2d 816, 832 (1982). Even assuming that the jury

did not consider the proffered evidence of nonstatutory mitigating circumstances, the en banc court held: "[T]hat evidence is unpersuasive. Using the *Frady* test, I cannot conclude that there is 'a substantial likelihood that the erroneous . . . instructions prejudiced [the defendant's] chances with the jury.'" *Ford v. Strickland*, 696 F. 2d at 822 (Godbold, C.J., dissenting in part and specially concurring in part) (quoting from *United States v. Frady*, 456 U.S. 174, 102 S.Ct. at 1597-98, 71 L. Ed. at 834). The court considered unpersuasive the testimony that Ford's father had been a belligerent alcoholic during his childhood, Ford's assumption of paternal responsibilities for his younger siblings, and his work during and after high school to provide support for the family. Id. 696 F.2d at 861 (Kravitch,

J. concurring in part and dissenting in part).

We consider the evidence of non-statutory mitigating circumstances in this case to be even less persuasive than that in *Ford*. Thus we are satisfied that there was no actual prejudice to Goode. The only evidence suggested by counsel for Goode which might qualify as nonstatutory mitigating evidence is evidence that Goode co-operated with the police and the prosecution.[10/] Reply Brief of Appellant at 17-18. Our

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10/ Counsel for Goode also points to Goode's history of mental illness since childhood and the history of his psychiatric and psychological treatment over the years. We are satisfied both from the jury instructions and the conduct of the trial that this jury felt no restraint in giving full consideration to all the evidence relating to Goode's mental condition, past and current. For example, during the sentencing phase, the trial judge charged the jury: "If one or more aggravating circumstances are es-

conclusion is supported by the fact that stand-by counsel for Goode during

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tablished, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed." Trial Transcript, at 1255. We thus conclude that the evidence relating to Goode's mental and emotional problems is encompassed within the statutory mitigating circumstances relating to "mental or emotional disturbance" and to diminished "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," both of which were charged to this jury. Moreover, the *Ford* case involved similar evidence, 696 F. 2d at 860-61 (Kravitch, J., concurring in part and dissenting in part), which the en banc court must also have deemed to be encompassed within the statutory mitigating circumstances.

closing argument at the sentencing phase expressly presented only three mitigating circumstances, Goode's young age of 22, Goode's mental or emotional disturbance and his diminished capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. We think that Goode's trial counsel properly perceived as relatively insignificant the fact of Goode's cooperation.

We thus conclude that Goode has failed to satisfy the prejudice prong of *Sykes*. Accordingly, his procedural default at trial, by failing to object to the jury instruction now challenged, bars federal habeas review of this issue.

VI. FAILURE TO RECITE STATUTORY AND NONSTATUTORY MITIGATING CIRCUMSTANCES

[12] Goode contends that the trial court improperly failed to recite certain statutory and nonstatutory mitigating circumstances. Specifically, he argues that the trial court should have found that Goode's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" by his mental condition, a statutory mitigating circumstance under Fla. Stat. Ann. §921.141(6)(f)(West Supp. 1982. 11/ In a recent en banc case,

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11/ Although Goode's challenge is unclear, possibly it might be interpreted as going to the sentencing judge's findings of fact with respect to the mitigating circumstances relating to Goode's mental deficiencies. We reject any such challenge. The evidence from the four psychiatrists was in conflict, and we cannot say that the judge's findings

this court characterized this same argument, made with reference to the Florida Supreme Court, as "simply 'quarreling'" with the state courts. *Ford v. Strickland*, 696 F. 2d 804, 819 (11th Cir. 1983)(Roney,J.). On the substantive issue of weighing of aggravating and mitigating circumstances, our review is limited to whether the Florida courts "have acted through a properly drawn statute with appropriate standards to guide discretion . . ." Id.

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are not fairly supported by the record. 28 U.S.C.A. § 2254(d)(8); *Sumner v. Matta*, 449 U.S. 539, 101 S.Ct. 764, 66 L. Ed 2d 722 (1981); *Ford v. Strickland*, 696 F. 2d 804, 819 (11th Cir. 1983) (en banc)(Roney,J.).

As in the *Ford* case, the Florida courts have so acted here. The Florida Supreme Court reviewed Goode's case with care and concern, refusing to depart from the normal review procedure, even though (1) Goode admitted his guilt, (2) Goode expressed a desire to be executed, and (3) Goode asked the Florida Supreme Court to dismiss his appeal. *Goode v. State*, 365 So. 2d at 384. As in *Ford*, the Florida Supreme Court "reviewed the circumstances of [the] case consistently with its principles governing the aggravating and mitigating circumstances at issue . . ." *Ford v. Strickland*, 696 F. 2d at 819. In discussing those circumstances, in noting the trial judge's and jury's consideration of Goode's mental condition at the time of the offense, and in comparing Goode's case with at least one other death penalty case for

consistency, the Florida Supreme Court properly discharged its function. 365 So. 2d at 384. Accordingly, we hold that Goode's claim with respect to the trial court's failure to recite statutory and non-statutory mitigating circumstances is without merit.

VII. CONSIDERATION OF EXTRA-RECORD MATERIALS

Goode contends that the Florida Supreme Court improperly received and considered extra-record materials in deciding Goode's direct appeal. The Florida Supreme Court rejected Goode's argument in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), *cert denied*, 454 U.S. 1000, 102 S.Ct. 542, 70 L. Ed. 2d 407 (1981). A recent en banc decision by this court has also rejected the same arguments. *Ford v. Strickland*, 696 F. 2d 804 (11th Cir. 1983). *Ford* is controlling, and

accordingly we find no merit in this issue.

VIII. NONSTATUTORY AGGRAVATING FACTOR

Goode contends that in sentencing him to death the trial court improperly relied on a nonstatutory aggravating factor. Goode argues that reliance on such a factor violates the state law limiting consideration to statutory aggravating circumstances, 12/ and

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12/ The Florida death penalty provision expressly provides that the aggravating circumstances which may be considered in determining the appropriate sentence "shall be limited" to those enumerated in the statute. Fla.Stat.Ann. §921.141 (5)(West 1982); *see Proffitt v. Florida*, 428 U.S. 242,250 n.8, 96 S.Ct. 2960, 2965 n. 8, 49 L.Ed. 2d 913 (1976); *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979) (reliance on nonstatutory aggravating circumstance by sentencing judge reversible error); *Elledge v. State*, 346 So. 2d 998, 1003 (Fla. 1977)(same); *Purdy v. State*, So. 2d 4,6 (Fla. 1977)(same).

also violates the Eighth and Fourteenth Amendments by introducing the extraneous, thus arbitrary aggravating factor into the decision-making process.

Specifically, Goode argues that the trial judge relied upon his belief that society could no longer rehabilitate Goode and that only the death penalty would "once and for all guarantee society . . . that [Goode] will never again kill, maim, torture, or harm another human being . . ." For convenience, we refer hereafter to the alleged nonstatutory aggravating circumstance as the "recurrance factor."

Goode's argument is based upon the record of the sentencing proceedings. After the jury had recommended death, and before the trial court issued its judgment, Goode's previous attorney, Smith, made a statement in Goode's behalf,

arguing that society had more to gain from a life sentence rather than a death penalty, *i. e.*, a life sentence would permit studies of Goode to advance scientific understanding of the subject of sexual abuse of children. Smith argued that the extensive psychiatric history of Goode, beginning when Goode was very young, presented a unique opportunity for such study, with potentially valuable benefits to society.

After Smith's statement, the trial judge issued his detailed findings in the sentencing phase. The trial judge made careful findings with respect to the aggravating circumstances, finding that only three aggravating circumstances existed. He then listed the two mitigating circumstances which he found to exist and the facts supporting them, stated that no other mitigating circum-

stances existed, detailed the facts that supported the finding of the three aggravating circumstances, stated that the mitigating circumstances did not outweigh the aggravating circumstances, and concluded that Goode should be sentenced to death. Following the foregoing careful and proper findings with respect to aggravating and mitigating circumstances, however, the trial judge made the following statements which form the basis of Goode's challenge:

> In closing I want to address myself to Counsel Smith's remarks for just a moment. The question of why should this man be executed for what he has done is a question that the Court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death. Could not something be learned from Arthur? Am I not doing as I have seen and heard many do and merely so outraged by the activities that he has done that possibly

my reason and judgment are blurred? I believe not.

If organized society is to exist with the compassion and love that we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no longer help, we can no longer rehabilitate and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate.

Philosophically, I believe that in certain limited instances we should do that. In this particular case that is my opinion, and that is my order, and the only answer I know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, main, torture or harm another human being, and as you said in trial, Arthur, maybe I don't know who we blame. God forgive you of those desires or something in your invironment that has made you have them, and whoever is to blame is beyond the power of this Court.

You have violated the laws, you have had your trial and I am convicned that the punishment is just and proper, and

> truthfully, may God have
> mercy on your soul.

Trial Transcript, at 1280-81.

It is readily apparent from the foregoing quotation that the trial judge asked himself the "question of why should this man be executed for what he has done," indicating that this was a question that the judge had "wrestled with for several days and . . . carefully considered the circumstances." Then in answer to his own question, the trial judge stated that "there are certain cases and certain times when we can no longer help , we can no longer rehabilitate, and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate." Thus the trial judge concluded: "In this particular case that is my opinion, and that is my order, and the only answer I

know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, maime, torture, or harm another human being." In sum, the trial judge asked himself why this man should be executed, and answered that Goode could no longer be rehabilitated and that imposing the death penalty was the only way to guarantee society that Goode would never kill again. It is readily apparent that the trial judge expressly cited the lack of rehabilitation and the possibility of future killing as a reason for imposing the death sentence.

However, when Goode presented this claim in a state habeas corpus petition, the Supreme Court of Florida rejected it, implicitly acknowledging that the foregoing would be an improper nonstatutory aggravating circumstance, but finding

that the trial judge did not consider same. The Florida court found that the statements by the trial judge merely "explained why the result of his weighing process was proper." *Goode v. Wainwright*, 410 So.2d at 509.

[13] We assume *arguendo*,[13] but expressly do not decide, that the foregoing finding of the Florida Supreme Court is entitled to the presumption of correctness afforded by 28 U.S.C.A. § 2254(d), unless the federal court on consideration of the record as a whole concludes that such factual determination is not fairly supported by the record. 28 U.S.C.A. §2254(d)(8). [14]

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[13] *Cf. Ford v. Strickland*, 696 F.2d at 811.

[14] Goode has also offered to show by convincing evidence that the factual

Sumner v. Matta, 449 U.S. 539, 101 S.Ct. 764, 66 L. Ed 2d 722 (1981); *Sumner v. Matta*, 455 U.S. 591, 102 S.Ct. 1303, 71 L. Ed. 2d 480 (1982) (subsequent opinion after remand).

[14] Evaluating the state court finding pursuant to the foregoing standard, and notwithstanding the deference we accord that finding, we are compelled to conclude that the state court finding is not fairly supported by the record as a whole. In finding that the

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determination by the Florida court was erroneous. 28 U.S.C.A. §2254 (d). Goode represents to us the trial judge is prepared to testify that he in fact did rely upon the nonstatutory aggravating factor. However, in *Washington v. Strickland*, 693 F. 2d 1243 (5th Cir. 1982) (en banc) (Unit B), we held that a trial judge may not testify about his "mental processes in reaching a judicial decision." Accordingly, Goode's challenge must be evaluated solely on the basis of the record of the sentencing proceedings, without the testimony of the trial judge.

sentencing judge did not consider the recurrence factor, the only elaboration given by the state court is that the trial judge was merely explaining why the result of his weighing process was proper. The Florida court's reason reveals the fallacy of its conclusion. When the sentencing judge explained that the "result of his weighing process was proper" because of the recurrance factor, it is apparent that the recurrence factor had in fact been considered. It is logically impossible to say that the death penalty is proper because of the recurrence factor and to simultaneously say that the factor was not considered.

Apparently sensing the inconsistency in the state court finding the State offers several post hoc rationalizations. First, the State suggests that the sen-

tencing judge's remarks were merely philosophical, *i. e.*, relating to capital punishment in the abstract as opposed to having any relationship to the instant case. It is true that the judge talked in abstract terms in two instances, but each time the judge immediately proceeded to apply the abstract thought directly to Goode. In one instance the judge stated:

> If organized society is to exist with the compassion and love we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no longer help, we can no longer rehabilitate and these are certain people, *and Arthur Goode is one of them*, that's [whose] actions demand that society respond and all we can do is exterminate.

Trial Transcript, at 12-80-81 (emphasis added). It is apparent that the judge was speaking abstractly in referring,

for example, to certain cases and certain times and certain people, but it is also apparent from the emphasized phrase that the judge applied the abstract thought to Goode.

Later the judge stated:

> Philosophically I believe that in certain limited instances we should do that. *In this particular case* that is my opinion, and *that is my order*, and the only answer I know that will once and for all guarantee society, *at least as far as it relates to this man*, is that *he will never again kill*, maim, torture or harm another human being.

Id. at 1281 (emphasis added). Again while the judge stated that he was speaking "philosophically," the emphasized phrases demonstrate clearly that the abstract thoughts were applied in "this particular case" and "as it relates to this man."

Finally, the remarks at issue were introduced by the judge's question to him-

self as to "why should *this* man be executed for what he has done," id. at 1280 (emphasis added), and by the judge's acknowledgement that this is a "question that the Court has wrestled with for several days and has carefully considered the circumstances," id., both of which reinforce the obvious fact that the justification offered by the judge in answer to his own question was being applied to this case and this man. [15]

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[15] In rejecting the State's abstraction argument, we are not at odds with the Florida Supreme Court. Nowhere did it mention or rely upon the alleged abstract nature of the judge's remarks. 410 So. 2d at 509. In the court below, the district judge did mention that the sentencing judge's remarks were in philosophical justification of capital punishment generally. however, the district judge acknowledged the obvious fact that the judge's remarks were also in philosophical justification of the capital punishment "as applied in Petitioner's case." *Goode v. Wainwright*, ____ F. Supp. ____ No. 82-23 (M.D. Fla. Feb. 12,1982). The district court's error was its failure to realize that a factor which is

Thus we conclude that the State's suggestion —i. e., that the sentencing judge's remarks were merely abstract and did not refer to any justification of this particular death sentence — simply cannot withstand a reading of the transcript. 16/

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expressly stated as justification for imposing a particular death penalty was necessarily *considered* as a factor in the sentencing process.

16/ A related argument relies upon the judge's remark that he has to be able to answer to himself. The argument is that the remarks at issue are his *personal* reasons. However, a factor is nonetheless nonstatutory and improper whether it be labeled a personal reason or a philosophical reason or an abstract reason. The crucial question is not the label but whether the factor is *relied upon* by the sentencing judge in his decision-making process. The words used by the judge here compel the conclusion that he did in fact rely upon the recurrence factor in making his decision. Although the judge said he has to answer to himself, the clear import of his remarks is that he has to answer to himself in making his decision *in this case*."The question of why should this man be executed for what

The second post hoc rationalization offered by the State to support the Florida Supreme Court determination is the chronology of the sentencing judge's written findings. The State argues that the judge made careful findings of three statutory aggravating circumstances, then found two mitigating circumstances, then found that the aggravating circumstances outweighed the mitigating, then stated the judgment of the court that

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he has done is a question that the court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death." Trial Transcript at 1280. This reference is not to an unrelated detached or separate personal reason; rather, the reference is to "why should this man be executed" and "why should I invoke the awesome punishment of death." There is absolutely no indication that the judge is talking about personal views upon which he *places no reliance*.

Goode be sentenced to death, then ordered Goode's counsel to prepare appropriate documents to initiate the appellate proceedings, and only after all this made the remarks at issue. The State's argument is that this chronology suggests that the remarks at issue were not part of the weighing process. The argument is not persuasive, however, because the remarks at issue unequivocally reveal that the nonstatutory recurrence factor was in fact considered by the judge in his weighing process and was in fact one of the judge's reasons for imposing the death sentence. Although the judge's remarks were made chronologically after he had announced the death sentence, the words used by the judge indicate clearly that the judge was reflecting on his decision-making process of the last few days:

> The question of why should this man be executed for what he has done is a question that the court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death.

Trial Transcript, at 1280. The balance of his remarks were in the nature of an answer to the question he asked himself. The question he asked himself – "why should I invoke the awesome punishment of death" — was of course the decision itself, which was obviously what the trial judge had been wrestling with for several days. We conclude that the chronology cannot obfuscate the sentencing judge's express statements that related his remarks to the crucial decision itself.

Our conviction that the sentencing judge did in fact consider the non-statutory aggravating factor is

reinforced by the fact that the same judge considered the same non-statutory recurrence factor in imposing an earlier death sentence. In *Miller v. State*, 373 So.2d 882 (Fla. 1979), the same judge faced a situation very much like this case. In *Miller*, the accused committed a heinous murder while suffering from a mental illness from which he was not likely to recover. The judge relied upon the nonstatutory recurrence factor, using language reminiscent of that used here:

> [T]he only certain punishment and the only assurance society can receive that this man never again commits to another human being what he did to that lady, is that the ultimate sentence of death be imposed.

Id. at 885. The Florida Supreme Court set aside the sentence in *Miller*, stating that "it was reversible error for the trial court to consider as an

additional aggravating circumstance, not enumerated by the statute, the possibility that Miller might commit similar acts of violence if he were to ever be released on parole." Id. at 886. The Florida Supreme Court did not decide *Miller* until two years after Goode was sentenced. Thus, it is likely that the trial judge did not yet realize that consideration of the recurrence factor was improper. Indeed, during Goode's sentencing proceeding the judge expressly articulated his belief that he could consider nonstatutory factors:

> It is not this Court's opinion that because those [the statutory aggravating circumstances] have been set forth in the statute that they are the only matters the Court can look at in sentencing. However, they are the primary guildelines the Court must

> use in reaching a decision as to whether to impose the sentence of death or life imprisonment.

Trial Transcript, at 1274. 17/

17/ In both *Miller* and the instant case, the judge listed the several statutory aggravating circumstances which he found to exist and then expressly stated, using virtually identical language, in each case, that he found no other aggravating circumstances. 373 So. 2d at 883; Trial Transcript at 1275. In *Miller* the Supreme Court of Florida apparently interpreted the trial judge to be saying at this point that he found no other *statutory* aggravating factors. Such an interpretation is even clearer in the instant case because the trial judge expressly stated on the record his understanding that he could consider nonstatutory aggravating circumstances.

Also supporting our conclusion are the unusual facts of this case. In the sentencing phase Goode himself testified in awful specificity, of his willingness to kill again:

> The next statement I have here to prove my guilt, is if Judge Shearer [the trial judge] would authorize this next statement, which I know he won't — I know you won't authorize it — but if the judge would authorize me to murder a little boy . . .[Goode's testimony is interrupted by an objection which is overruled, and then Goode continues] As I was starting to say . . . I am ready right now, I am ready right now to murder another little boy. I am strictly a dangerous cold blooded murderer.

Trial Transcript at 1198-99. Thus, the trial judge was presented with stark evidence that Goode would in fact kill again. It would have taken considerable self-discipline to ignore such forceful testimony. Obviously trial judges and other judges can and routinely

do ignore and decline to rely upon improper factors. However, a fair reading of the instant record compels the conclusion that the recurrence factor in this case was not ignored,but rather was relied upon as crucial evidence.

The transcript of the sentencing proceedings in this case yields only one possible reading, i. e., that the sentencing judge did rely upon the non-statutory aggravating circumstance as one reason for imposing the death penalty on Goode. Accordingly, we conclude that the contrary finding of the Florida Supreme Court is not fairly supported by the record. 18/

18/ We acknowledge considerable discomfort at the prospect of setting aside a sentence because the state trial judge considered the factor at issue here. The recurrence factor—e.g., whether a defendant is likely to kill again —

Having determined that the state trial judge did consider the non-statutory rehabilitation factor, we next address Goode's contention that the Eighth and Fourteenth Amendments have been violated because reliance on the extraneous factor introduced an arbitrary element into the sentencing decision in contravention of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726,

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is so highly relevant to the purposes underlying capital sentencing that it certainly would be an appropriate aggravating circumstance, had the Florida lawmakers designated it as such. However, it is not for us to establish the substantive sentencing policy for the State of Florida, and the Florida law is clear that the recurrence factor is *not* a statutory aggravating factor. *Miller v. State*, 373 So. 2d 882, 886 (Fla. 1979)("The legislature has not authorized consideration of the probability of recurring violent acts by the defendant."). The fact that the trial judge in the instant case relied upon this nonstatutory aggravating circumstance raises constitutional problems relating to whether the sentence has been imposed in an arbitrary manner,

33 L. Ed.2d 346 (1972), and its progeny.

We know from *Miller v. State*, 373 So. 2d 882 (Fla. 1979), that potential defendants in Florida cannot be sentenced to death in reliance upon the fact or probability that they cannot be rehabilitated and therefore probably would repeat such acts of violence. In *Miller*, the same trial judge who sentenced Goode relied upon the same recurrence factor. Concluding that the factor was a nonstatutory aggravating

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as discussed below, wholly aside from whether or not the recurrence factor is one which could have properly been part of the statutory scheme had the State so provided. *Henry v. Wainwright*, 661 F.2d 56, 60 n. 9 (5th Cir. 1981) (Unit B), *vacated and remanded on other grounds*, ——U.S. ——, 102 S.Ct. 2922, 73 L.Ed.2d 1326, *judgment reinstated*, 686 F.2d 311 (5th Cir. 1982).

circumstance and that the sentencing judge's reliance upon it was improper, the Florida Supreme Court ordered that Miller be resentenced.

As demonstrated by the above discussion, Goode's death sentence was imposed in reliance upon the recurrence factor. If we should permit Goode's death sentence to stand, Goode's execution would represent a unique, freakish instance. Goode would have been executed in reliance upon the recurrence factor, when all others in Florida have not been, and pursuant to the law established in *Miller*, cannot be in the future. A central thrust of recent Supreme Court cases is that capital-sentencing procedures must avoid the imposition of the death penalty in an arbitrary and capricious manner. Since the landmark case of *Furman v. Georgia, supra*, the Supreme

Court has insisted that the death penalty be imposed only pursuant to statutory schemes that are carefully designed to reduce the possibility of discriminatory and arbitrary sentencing. The focus has been on providing the decision-maker with relevant and accurate information, so that discretion is channelled by those clear and objective standards taht the state deems relevant. *See Gregg v. Georgia*, 428 U.S. 153, 188-95, 96 S.Ct. 2909, 2932-35, 49 L.Ed. 2d 859 (1976) (Steward, J., joined by Powell & Stevens, JJ.); id at 220-23, 96 S.Ct. at 2947-48 (White, J., joined by Burger, C.J. & Rehnquist, J.); *Proffitt v. Florida*, 428 U.S. 242, 251-54, 96 S.Ct. 2960, 2966-67, 49 L.Ed.2d 913 (1976)(Powell, J., joined by Stewart & Stevens, JJ.); *Godfrey v. Georgia*, 446 U.S. 420, 427-29, 100 S.Ct. 1759, 1764-65,

64 L.Ed. 2d 398 (1980) (Stewart, J., joined by Blackmun, Powell, & Stevens, JJ.); *cf. Gardner v. Florida*, 430 U.S. 349, 357-61, 97 S.Ct. 1197, 1204-05, 51 L. Ed. 2d 393 (1977)(Stevens, J., joined by Stewart & Powell, JJ.). Thus viewed, the cases are concerned primarily with the Eighth Amendment as a devise for guarding against arbitrary, capricious, or "freakish" sentencing:

> A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the death penalty] . . . is imposed from the many cases in which it is not.

Godfrey v. Georgia, 446 U.S. at 427, 100 S.Ct. at 1764.

[15] In determining whether the trial court's reliance on a nonstatutory aggravating circumstance, a violation of Florida's own sentencing statute, contravenes the Eighth and Fourteenth Amendments, we therefore look to the same

concerns for consistency and channelled discretion which have informed the Supreme Court's decisions in *Furman*, *Proffitt*, and *Gregg*. These concerns are even more acute here. In *Proffitt* and *Gregg*, the Court addressed only facial challenges to untested capital punishment statutes. Thus, the Court's decisions centered around the likelihood that a particular scheme, when actually used, would result in "wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932 (Stewart, J., joined by Powell & Stevens, JJ.). Of central importance to the Court was the probability that similarly situated defendants, in terms of personal history and characteristics, as well as the nature of their crimes, would suffer the same punishment. *See id.* at 198, 96 S.Ct. at 2936 (discussing

review by Georgia Supreme Court to compare each death sentence with sentences received by similarly situated defendants); *id.* at 224, 96 S.Ct. at 2948 (White, J., with Burger, C.J. & Rehnquist, J., concurring in judgment)(suggesting that failure by state supreme court to perform disproportionality review would impair constitutionality of statutory scheme); *Proffitt v. Florida*, 428 U.S. at 253, 96 S.Ct. at 2967 (Powell, J., with Stewart & Stevens, JJ.) (citing review by Florida Supreme Court to ensure that sentence is consistent with other sentences imposed in similar circumstances). In other words, the Eighth Amendment analysis set out in *Furman* and its progeny logically applies at two separate stages: first, when the statutory terms on their face will not suffice to prevent arbitrary sentencing;

and second, when the statutory scheme, regardless of its facial validity, is applied in an arbitrary manner. See *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1764, 64 L. Ed. 2d 398 (Stewart, J., joined by Blackmun, Powell & Stevens, JJ.)(state has responsibility to tailor *and apply* its law in manner that avoids arbitrary and capricious sentencing); *Gregg v. Georgia*, 428 U.S. at 224, 96 S.Ct. at 2948 (White, J., joined by Burger, C.J. & Rehnquist, J., concurring in judgment)(suggesting that failure by state supreme court properly to perform disproportionality review mandated by statute would require setting aside of death sentence); *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978) (if state has properly drawn statute, which it follows, then arbitrariness and capri-

ciousness condemned in *Furman* are conclusively removed), *cert. denied*, 440 U. S. 976, 99 S.Ct. 1545, 59 L.Ed. 2d 796 (1979). Thus, a particular scheme may inherently result in arbitrary sentencing, or it may be applied in such a manner as to single out for different treatment one particular defendant —— as, for example, when the sentencing court chooses to ingnore altogether the statutory requirements. Either way, the result is an arbitrary or capricious application of the death penalty.

Stated in another way, the Eighth Amendment requirements of consistency and nonarbitrariness are the predicate and *raison d'etre* of the Florida rule that nonstatutory aggravating circumstances cannot be considered. When that rule is ignored and non-

statutory circumstances are considered, Eighth Amendment concerns are implicated. We so held in *Henry v. Wainwright*, 661 F. 2d 56 (5th Cir., 1981) (Unit B), *vacated and remanded on other grounds* ——*U.S.*———, 102 S. Ct. 2922, 73 L. Ed. 2d 1326, *judgment reinstated*, 686 F.2d 311 (5th Cir. 1982). In *Henry*, we said:

> Here, however, the limitations of the statute make the death penalty constitutional. Ignoring those limitations thus implicates the Constitution.

661 F.2d at 60.

When understood in terms of the Supreme Court's concern for rational consistency in sentencing, the issue before this court is a relatively simple one. Goode's death sentence was imposed in reliance on a factor which the Florida courts themselves have ruled improper. If we should permit Goode's

sentence to stand, Goode's execution would represent a unique, freakish case. No other defendant in the State of Florida could be so executed, pursuant to the law established by the Supreme Court of Florida in *Miller v. State*, *supra*. Thus, whatever might be the outer bounds of the "arbitrary or capricious" concept developed in *Furman* and its progeny, the instant case surely lies at its core. A departure without reason from the express terms of the sentencing statute, with the result that this defendant would be executed when all others in the same circumstances would not be, is the very benchmark of arbitrary and capricious decision-making. As such, it constitutes more than a mere violation of Florida's own sentencing procedures; it also implicates those concerns which are fundamen-

tal to the Supreme Court's interpretation of the Eighth Amendment. 19/

19/ That is the violation of Florida's own sentencing rule which triggers the Eighth Amendment violation requires some comment. We recognize that the violation by a state of its own criminal procedure rule generally is not cognizable on federal habeas. *See e.g., Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979); *Blankenship v. Estelle*, 545 F. 2d 510 (5th Cir. 1977), *cert. denied*, 444 U.S. 856, 100 S.Ct.115, 62 L.Ed. 2d 75 (1979); *Bell v. Estelle*, 525 F. 2d 656 (5th Cir. 1975); *Pringle v. Beto*, 424 F.2d 515 (5th Cir. 1970). Occasionally, however, such a violation will implicate constitutional concerns—most often the concept of "fundamental fairness" which resides in the Fourteenth Amendment. *See e.g., Bryson v. Alabama*, 634 F. 2d 862 (5th Cir. 1981); *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. 1981); *Maggard v. Florida Parole Commission*, 616 F.2d 890 (5th Cir.), *cert. denied*, 449 U.S. 960, 101 S.Ct. 372, 66 L.Ed. 2d 227 (1980); *Atkins v. Michigan*, 644 F.2d 543 (6th Cir.), *cert. denied*, 452 U.S. 964, 101 S.Ct. 3115, 69 L.Ed. 2d 975 (1981); *Brewer v. Overberg*, 624 F. 2d 51 (6th Cir. 1980), *cert. denied*, 449 U.S. 1085, 101 S.Ct. 873, 66 L. Ed. 810 (1981). The constitutional significance of a state procedural violation is not necessarily limited to Fourteenth Amendment in-

We conclude therefore that Goode's sentence was imposed in an arbitrary manner and that his execution would be a freakish instance, in violation

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terests. As *Furman* and its progeny demonstrate, the substantive content of the Eighth Amendment is uniquely concerned with procedural regularity. *See Lockett v. Ohio*, 438 U.S. 586, 632, 98 S.Ct. 2954, 57 L.Ed 2d 973 (1978) (Rehnquist, J., dissenting)(criticizing use of Eighth Amendment as devise "for importing into the trial of capital cases extremely stringent procedural restraints"). Thus, in death penalty cases the constitutional dimensions of the Eighth Amendment's proscription of cruel and unusual punishment have significant procedural imperatives. This requires that we take as our starting point those procedures which the state has implemented to prevent the arbitrary imposition of the death penalty. *See Godfrey v. Georgia*, 446 U.S. at 427-33, 100 S.Ct. at 1764-67 (Stewart, J., joined by Blackmun, Powell & Stevens, JJ). Implicit in a decision that a particular scheme will likely result in rational and consistent sentencing is the critical assumption that the state will *follow* that scheme. Thus, the failure to abide by that scheme can result in the arbitrary imposition of the death penalty in violation of the Eighth Amendment. *Accord Henry v. Wainwright, supra.*

of the Eighth and Fourteenth Amendments. 20/

20/ We do not read *Spinkellink v. Wainwright, supra,* as prohibiting our inquiry as to whether Goode's execution would be an arbitrary departure from Florida's capital-sentencing procedures. In *Spinkellink,* the Former Fifth Circuit wisely declined to duplicate the proportionality review of other cases conducted by the Florida Supreme Court to ensure that Spinkellink was equally or more deserving of the death sentence. *See also Ford v. Strickland,* 696 F.2d 804, 818-19 (11th Cir. 1983)(Roney,J.). That, however, is vastly different from our inquiry in the instant case into the discrete matter of whether the trial judge in fact relied upon the nonstatutory recurrence factor and thus departed from the statutory procedures. Our inquiry is much like that undertaken by the en banc court in *Ford v. Strickland,* when it addressed whether or not the Florida Supreme Court had relied upon extra-record materials. Indeed the *Spinkellink* panel itself implicitly recognized the problems inherent in the failure to follow the statutory procedures:

> [O]ur concern here in this attack on Section 921.141 as applied would be whether the Florida courts have *followed* the statute in imposing Spinkellink's death sentence, and a comparison

In our recent en banc decision, *Ford v. Strickland*, 696 F. 2d 804 (11 th Cir. 1983), we concluded that, under some circumstances, consideration

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of Spinkellink's case with other Florida death penalty cases would be unnecessary. 578 F.2d at 604 (emphasis added). Thus the broad language of *Spinkellink* disparaging an "as applied" challenge must be read in the context of the facts of that case, and not as a per se ban on any "as applied" attack on a capital-sentencing statute. The "as applied" challenge in the instant case is very similar to that entertained and sustained by the Supreme Court in *Godfrey v. Georgia*, 446 U. S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). There the Court examined Godfrey's claim that the state court had rendered an arbitrary construction of one of the aggravating circumstances. The Court framed the issue as "whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the [aggravating circumstance]" Id. at 432, 100 S.Ct. at 1766. (Stewart, J., joined by Blackmun, Powell & Stevens, JJ.) The Court examined the facts of the particular murders, determined

of a nonstatutory aggravating factor would not impermissibly taint the process. It is appropriate, therefore to

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that those facts did not include torture of other criteria that the Georgia Supreme Court had defined as limiting characteristics of the statutory factor, and thus concluded that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433, 100 S.Ct. at 1767. Although Justice Stewart's plurality opinion was joined by only three other Justices, Justices Brennan and Marshall agreed with the plurality that the statute was unconstitutionally applied. *Id.* at 433, 434-36, 100 S.Ct. at 1767, 1767-68 (Marshall, J., joined by Brennan, J., concurring in the judgment).

Following *Godfrey* we are required to evaluate whether Goode's death sentence was imposed in an arbitrary manner.

indicate why the issue before us is different from the issue addressed in *Ford*. There, we addressed the constitutional implications of a rule (referred to hereafter as the "Florida rule") which has evolved in several Florida Supreme Court cases. Pursuant to the Florida rule, the Florida Supreme Court has sustained death sentences in the following situation: where the sentencing judge has found several statutory aggravating circumstances but no mitigating circumstances; and where the Florida Supreme Court has found on direct appeal a deficiency in some but not all of the aggravating factors and can "presume" that the weighing process would have reached the same outcome. Thus, the Florida Supreme Court has sustained the death penalty, notwithstanding the fact that the sentencing judge erroneously found

one or more aggravating circumstances, where there are other valid statutory aggravating circumstances and where there are *no* mitigating circumstances and where the Florida Supreme Court can conclude that the outcome of the weighing process would not have been changed.

A majority [21/] of the en banc court in *Ford* interpreted the Florida rule as "a harmless error rule to correct mere errors of state law, *Ford v. Strickland*, 696 F. 2d 804, 820 (Godbold, C.J., dissenting in part and specially concurring

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21/ Chief Judge Godbold's opinion was joined by Judge Clark. Judge Roney's opinion was joined by Judges Hill, Fay, Vance and Henderson. Together the two opinions commanded the support of seven judges, a majority of the court.

in part, or as "an evaluation . . . very like the application of a harmless error rule." *Id.* at 815 (Roney, J.). The majority held that such a state law harmless error, 22/ which presumably will be applied "with an eye towards consistency," *id.* at 823, does not violate the Eighth Amendment requirements of consistency and reliability.

We conclude that *Ford* is not applicable to the instant case for two reasons. First, the sentencing judge here found two mitigating circumstances:

22/ Chief Judge Godbold expressly treats the Florida rule as "a harmless error rule to correct mere errors of state law." *Id.* at 824. Judge Roney does not do so expressly, but he does so implicitly; he adopts Judge Godbolds's opinion, and he does not mention *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed. 2d 705 (1967), which articulates the standard applicable to constitutional errors, *i.e.*, harmless error beyond a reasonable doubt. *Ford v. Strickland*, 696 F.2d at 813-15.

the fact that there was no evidence of prior criminal activity, and the fact of Goode's youth, i. e., 22 years of age. In addition, the evidence from all four psychiatrists was undisputed that Goode suffered from a mental disorder, *Goode v. State*, 365 So. 2d at 382, although two of the psychiatrists testified, and the sentencing judge found, that Goode was not under the influence of extreme mental or emotional disturbance at the time of the crime, and that Goode's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not substantially impaired. Because there were substantial mitigating circumstances in this case, the Florida rule by its own terms is inapplicable. Thus, there was no state rule or procedure in this case to alleviate the trial

judge's error in relying upon the improper recurrence factor. In *Ford* the consistent application of the Florida harmless error rule would tend to ensure that all others in Ford's circumstances would receive the same treatment. By contrast, Goode would be executed here. Although all other defendants in the state would have been entitled to resentencing under the circumstances.

[16] Second, the consideration of the nonstatutory aggravating circumstance in the instant case involves error of constitutional dimension, whereas in *Ford* Chief Judge Godbold [23]

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[23] Judge Roney's *Ford* opinion approving the Florida rule is not expressly limited to state law errors, but such limitation may be implicit. See note 22, *supra*.

expressly limited his approval of the Florida rule to cases involving mere errors of state law, *id.* at 824, and expressly distinguished *Henry v. Wainwright, supra,* because it involved constitutional error. 24/ To conclude that constitutional error is harmless, a reviewing court must apply the *federal* standard and conclude that the error is harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed. 2d 705 (1976). In the instant case the State does not suggest that the sentencing judge's reliance

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24/ *Henry v. Wainwright, supra,* involved the same constitutional error which we now address, *i. e.*, consideration of a nonstatutory aggravating circumstance.

on the recurrence factor is harmless. Moreover, it is not possible to read the sentencing transcript without concluding that the trial judge placed significant, and perhaps decisive, reliance upon the improper recurrence factor. Therefore, we must conclude that the error was not harmless beyond a reasonable doubt.

[17] Concluding that Goode's death sentence was imposed in an arbitrary and freakish manner, we find 25/ that the Eighth and Fourteenth Amend-

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25/ Since the State had not argued that *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977), bars consideration of this issue, we do not consider the *Sykes* bar as a ground for denying appellant's claim. *Washington v. Watkins*, 655 F.2d 1346, 1368 (5th Cir. 1981), *cert denied*, ____ U.S. ____, 102 S.Ct. 2021, 72 L.Ed. 2d 474 (1982).

ments have been violated. 26/

26/ It is true and the constitutionality of the Florida rule may be implicated in *Barclay v. Florida*, 411 So. 2d 1310 (Fla. 1982), in which the Supreme Court has recently granted certiorari. ____U.S.____, 103 S.Ct. 340, 74 L.Ed. 2d 382 (1982). Also pending in the Supreme Court is *Zant v. Stephens*, _____U.S._____, 102 S. Ct. 1856, 72 L.Ed. 2d 222 (1982), which involves an analogous Georgia rule. Thus, it is true that there is a possibility of a Supreme Court ruling that a state may constitutionally permit the consideration of a nonstatutory aggravating factor under some circumstances. However, neither case challenges a death sentence which was imposed in reliance upon an aggravating factor which the state procedures themselves forbid; and neither case involves the proposed execution of a defendant notwithstanding that all others in the state would have been entitled to resentencing under the circumstances. For these reasons, we do not anticipate that either case would affect our decision in the instant case and accordingly we decline to delay our decision pending disposition of *Barclay* and *Stephens*.

IX. CONCLUSION

For the reasons set out in Part VIII, this case must be remanded to the district court with instructions that the writ of habeas corpus issue conditioned upon the State's resentencing of Goode.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MEMORANDUM OPINION*

Arthur F. Goode, III, is a prisoner of the State of Florida under sentence of death. He petitions this Court for habeas corpus relief pursuant to 28 USC 2254.

After painstaking review of the entire record and each of his claims, I find that none of them have merit, and his petition will be Denied.

A. History of the Case

The following background is derived entirely from the Petitioner's own petition.

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* The appendix which accompanied this opinion has been omitted from this appendix.

The Petitioner, at the time he killed ten year old Jason Verdow by strangulation on March 5, 1976,* was a twenty-two year old escapee from a mental hospital in Spring Grove, Maryland, who had been under one form or another of psychiatric or psychological

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* There has never been an issue that the Defendant committed this crime. Attached as an Appendix to this opinion is a copy of that portion of the transcript of the Petitioner's own testimony at trial relating in chilling detail what happened after he enticed Jason away from a school bus stop.

counseling since the age of five years. He had been committed to the hospital at Spring Grove as a result of having molested several children in the Washington, D.C. area. However, at the time he walked away from the hospital, the fact was unreported to authorities.

Following the Petitioner's escape, he traveled to Lee County, Florida, where his parents resided, and within a short period of time he began looking for children to involve them in sexual activities. On March 5, 1976, the Petitioner saw ten year old Jason Verdow waiting for a school bus with several neighborhood children. Eventually, the Petitioner left the bus stop with Jason and walked into a wooded area where he sexually assaulted the child, both orally and anally, and then

strangled him with a belt. (See Appendix).

The following day, Jason's body was discovered partially concealed under palmetto fronds in the woods near the bus stop by a Cape Coral police officer. The medical examiner, Robert Schultz testified that Jason had died of asphyxia, secondary to strangulation.

Several days following the child's murder, the Petitioner was questioned by the Cape Coral City Police as a result of a neighbor's suspicion. Although the Petitioner answered questions for the police and submitted himself to a polygraph, he was released without being charged. Thereafter, the Petitioner returned to Maryland for the purpose of reentering the hospital and actually went to the hospital, identified himself to the receptionist and

was told to have a seat and wait. Apparently, the hospital had been notified that the Petitioner would be arriving and that he was wanted for further questioning in Florida. However, neither the local police nor the hospital took any precautions to secure the Petitioner upon his arrival. After waiting for a brief period of time, the Petitioner fled the hospital and shortly thereafter kidnapped two children, Billy Arthes and Kenneth Dawson, later killing Dawson in Virginia. Petitioner admitted to Arthes that he had murdered Verdow, and he killed Dawson in the presence of Arthes. The State of Virginia tried and convicted the Petitioner of Dawsons's murder and sentenced him to life in prison.

While in Virginia, Petitioner gave a statement to the press in which he demanded to be returned to Florida. He said that he had a constitutional right to be tried in Florida and sentenced to die in the electric chair. Immediately upon his return to Florida, the Petitioner gave a full confession to the state attorney prosecuting the case.

On October 11, 1976, Petitioner was indicted in Lee County, Florida, for the premeditated murder of Jason Verdow. He was represented during the preliminary stages of the case by the same retained counsel who now reappears as attorney of record in this proceeding.

Among other motions, counsel filed a pleading suggesting that the Petitioner was insane. The trial court

appointed three psychiatrists to examine the Petitioner, and an evidentiary hearing was held on January 13, 1977. Four psychiatrists testified during that hearing -- one called by the Petitioner's counsel and the three previously appointed by the court. All of them stated that the Petitioner suffered a mental disorder. But three of the four expressed the opinions that he was competent, i. e., that he had a rational understanding of the charge and the nature of the proceedings, and had the ability to assist counsel in preparing

and presenting his defense.* The trial court then found the Petitioner competent to stand trial and to assist his counsel.

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* The testimony of the physicians during that hearing was subsequently quoted at length by the Supreme Court of Florida in its opinion on direct appeal. Goode v. State, 365 So. 2d 381 (Fla. 1978). The three psychiatrists appointed by the Court were also called to testify at a later time before the jury as court's witnesses during the penalty phase of the trial. Each expressed the opinion that the Petitioner had a personality disorder but was not psychotic and was competent at the time of the offense, i. e., that he knew right from wrong. (Florida follows the M'Naghten rule). The trial court called the witnesses during the penalty phase because of the reference to "extreme mental or emotional disturbance" as a mitigating circumstance in Florida Statute 921.141 (6)(b).

The following day, January 14, 1977, the Petitioner advised the trial court that he wanted to discharge his retained attorney. After examining the Petitioner personally, the court excused retained counsel but appointed the public defender to act as Petitioner's advisor during the remainder of the proceedings.*

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* The colloquy concerning these events was also quoted and discussed by the Supreme Court of Florida in its opinion on direct appeal. Goode v. State, 365 So. 2d 381, 383 (Fla. 1978).

Thereafter, the Petitioner participated jointly with his counsel in conducting most aspects of the proceeding including presentation of argument to the court, cross examination of witnesses and summation to the jury.

The case was called for trial on March 15, 1977. At the outset of the proceedings the Petitioner's appointed counsel requested a change of venue due to the abundance of pre-trial publicity concerning the case. The Petitioner himself opposed the motion and the trial judge reserved ruling until completion of the voir dire examination of the jury panel. Although a number of prospective jurors acknowledged familiarity with the case, anyone who had formed an opinion was excused and each of those selected avowed, under oath, that they were impartial and could approach the case

with an open mind. The Petitioner expressly affirmed his satisfaction with the jury after it was selected but before it was empanelled.

The jury verdict of guilty was returned on March 17, 1977. The penalty phase of the trial was conducted the following day and the jury returned a recommendation of death. On March 22, 1977, the state trial court adjudged the Petitioner quilty and sentenced him to death.

The Supreme Court of Florida affirmed the judgment on September 7, 1978 in Goode v. State, 365 So. 2d 381 (Fla. 1978). Motion for rehearing was denied on January 15, 1979.

The Petitioner then filed a petition for a writ of certiorari in the Supreme Court of the United States on

March 30, 1979. The petition was denied on May 21, 1979. Goode v. Florida, 441 U.S. 967, 99 S.Ct. 2419 (1979).

The Petitioner then filed his first and only motion for post-conviction relief, pursuant to Rule 3.850, Florida Rules of Criminal Procedure, in the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida. That motion was denied without the benefit of an evidentiary hearing on June 6, 1980, and the Petitioner's motion for rehearing was denied on June 27, 1980.

The Petitioner filed an appeal from the denial of the motion for post conviction relief to the Supreme Court of Florida on July 30, 1980. The Supreme Court of Florida affirmed the judgment

and denied the motion for rehearing on October 9, 1981. Goode v. State, 403 So. 2d 931 (Fla. 1981).

On September 29, 1980, the Petitioner and others filed a petition for writ of habeas corpus in the Florida Supreme Court alleging improper receipt of a psychological screening report. The petition was denied in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). The Petitioner then filed a petition for writ of certiorari with the United States Supreme Court on April 3, 1981, which was denied on November 2, 1981. Brown v. Wainwright, ____U.S.____, 102 S.Ct. 542 (1981).

The Petitioner filed a petition for writ of habeas corpus before the Florida Supreme Court on February 11, 1982, alleging ineffective assistance of appellate counsel on his direct

appeal. The Petitioner's brief was due on Tuesday, February 16, 1982, and oral argument was set on Monday, February 22, 1982, at 9:00 A.M . The Court's opinion denying the petition was filed on February 23, 1982 (shortly prior to the hearing I conducted on that date), and a copy of that opinion has now been filed in these proceedings.

In the meantime, on February 5, 1982, the Governor of Florida executed a Death Warrant and execution of that warrant has been scheduled for 7:00 A. M., March 2, 1982.

The petition in this Court was filed February 16, 1982, together with a motion to stay the execution. The Respondent immediately filed his answer to the petition on February 18, 1982,

together with a complete transcript and record of the proceedings in state court. See Rule 5, Rules Governing Section 2254 Cases in the United States District Courts. Both parties have also filed briefs and exhibits in support of their principal pleading.

A hearing was conducted before me on February 23, 1982. The Petitioner and counsel of record were present. Pursuant to the order scheduling that hearing, the matters presented included the Petitioner's motion for a stay of execution; the question whether a subsequent evidentiary hearing would be required; and if not, the making of such disposition of the petition as justice shall require. Rule 8(a), Rules Governing Section 2254 Cases in the United

States District Courts.

In consequence of that hearing, and following study of the entire record of the state court proceedings and the briefs and papers filed in this Court, it is apparent that there is no issue of fact warranting or requiring an evidentiary hearing, that the petition is without merit and should be denied, and that the motion for a stay of execution should also be denied.

B. THE CLAIMS PRESENTED

The constitutional claims asserted in the petition and in the supporting brief can be grouped into five categories: (1) Denial of effective assistance of counsel at trial in violation of the Sixth and Fourteenth Amendments; (2) Denial of a fair trial in violation of the Fifth and Fourteenth Amendments;

Misapplication of the Florida death penalty statute in violation of the Eighth and Fourteenth Amendments; (4) Improper consideration of confidential information by the Supreme Court of Florida during its review of the sentence in violation of the Fifth and Fourteenth Amendments; and (5) Denial of effective assistance of counsel on appeal in violation of the Sixth and Fourteenth Amendments.

C. DISCUSSION OF THE CLAIMS

1. Denial of effective assistance of counsel at trial. The claim concerning the alleged denial of the Sixth Amendment right to effective assistance of counsel at trial has three separate aspects: (a) that the Petitioner was inadequately warned by the trial court

concerning the dangers of self-representation pursuant to Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975); (b) that he was forced to accept a form of "hybrid" representation which operated to deny both his right to represent himself and the effective assistance of counsel; and (c) that court appointed counsel rendered ineffective assistance by offering defenses inconsistent with those advanced by the Petitioner.

In Faretta v. California, supra, the Court held that a defendant in a federal or state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed without counsel when he elects to do so. However, the Court also stated (422 U.S. at 835, 95 S.Ct. at 2541):

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Johnson v. Zerbst, 304 U.S., at 464-465; 58 S. Ct., 1023. CF. Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L. Ed. 309 (plurality opinion of Black. J.) Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242."

In this instance, as previously noted, the trial court addressed the Defendant personally concerning his request to proceed pro se; and, although "a defendant need not have the skill and experience of a lawyer in order competently and intelligently to choose self-representation," (Faretta, supra), the judge asked him a series of relatively simple questions concerning the element of murder and the procedure to be followed at trial, and when the Petitioner declared "I don't understand," the Judge said: "Then you need a lawyer to explain these things to you," a clear warning concerning the dangers of self-representation. The Court then granted the Petitioner's motion to proceed pro se -- thereby complying with rather than violating the dictates of Faretta - - but in an ob-

vious effort to safeguard the rights of the accused, the judge also appointed the public defender to advise and assist the Petitioner.

The Supreme Court of Florida addressed this claim on Petitioner's direct appeal as follows (365 So. 2d at 384):

> "Defendant Goode unequivocally declared that he wanted to represent himself. The record shows that he was literate, competent, and understanding. He was voluntarily exercising his informed free will even though the judge warned him that it was a mistake not to accept representation. Nevertheless, in an effort to further protect his rights, the court furnished counsel for the purpose of giving legal advice when needed. Defendant did not object to this form of self-representation with the assistance of appointed counsel. The record clearly reflects that defendant was allowed self-representation and the record does not reflect that counsel was forced upon an unwilling defendant. In fact, defendant knowingly consented to the appearance of counsel and, in fact, sought legal

advise from him during the course of the trial."

That finding and conclusion was clearly correct, is amply supported by the record, * and is now adopted as

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* The Respondent contends that consideration of this claim is foreclosed precisely because it has been determined by the Supreme Court of Florida, citing 28 USC § 2254 (d) and the recent decision in Sumner v. Mata, _____ U.S. _____, 101 S.Ct. 764 (1981). The Respondent may well be correct (compare, Panzavecchia v. Wainwright, 658 F. 2d 337 (5th Cir. 1981) holding that the statutory presumption of correctness does not apply to mixed questions of law and fact); but, as stated, in the text, I have not relied upon or applied the statute as a bar. A review of the record led me to the same, independent conclusion.

this court's independent finding and conclusion.

The second aspect of the Petitioner's ineffective assistance claim -- that he was forced to accept a form of "hybrid" representation -- is directly foreclosed by the recent en banc decision of the Fifth Circuit Court of Appeals in Brown v. Wainwright, No. 78-2532, Jan. 11, 1982, Slip Op. 14110. In Brown the court held:

> "Unlike the right to counsel, the right of self-representation can be waived by defendant's mere failure to assert it. If on arraignment an indigent defendant stands mute, neither requesting counsel nor asserting the right of self-representation, an attorney must be appointed. Even if defendant requests to represent himself, however, the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request

altogether."

In this case the Petitioner, upon being granted the right to speak for himself, never objected to the simultaneous appointment and assistance of the public defender. On the contrary, the trial record shows that he affirmatively sought leave on several occasions during the proceedings to consult his counsel (which was granted in each instance), and that he even made laudatory references to his lawyer on two other occasions. * Any right the Petitioner

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* It is interesting to note that under state law the Petitioner probably enjoyed a right to the dual or hybrid representation of which he now complains--a right or option beyond those available in federal court. The Florida Constitution, Article I, Section 16, 25A FSA 347, provides that in all criminal cases the accused shall have the right "to be heard in person, by counsel or both . . ." (Emphasis supplied). On

may have had to object to the appointment of counsel, under Faretta or otherwise, was clearly waived in this case pursuant to the decision in Brown.

The final aspect of Petitioner's ineffective assistance claim - - that his counsel asserted defenses inconsistent with his own -- is simply, and utterly, frivolous. The Petitioner offered no defense. As he stated, repeatedly, his sole interest in having a trial was ". . . to testify fully what I done and why I done it."He was

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the other hand, 28 USC §1654 provides that: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . ."; and this has been interpreted by the Fifth Circuit to mean that a party has "no right to a hybrid representation partly by himself and partly by counsel." Lee v. State of Alabama, 406 F. 2d 466 469 (5th Cir. 1969)

given, and he exercised, that opportunity (See Appendix).

2. Denial of a fair trial. The claim concerning denial of a fair trial in violation of the Fifth and Fourteenth Amendments also has several aspects: (a) Denial of a change of venue, despite pervasive, pre-trial publicity; (b) Permitting the Petitioner himself to conduct a press conference during trial contrary to Sheppard v. Maxwell, 384 U. S. 333, 86 S.Ct. 1507 (1966); (c) The general management of the trial by the trial judge; and (d) The mental competency of the Petitioner.

As previously noted (pages 4 and 5, supra), when the case was reached for trial the Petitioner's appointed counsel requested a change of venue due to pre-trial publicity. The Peti-

tioner himself expressly opposed the motion and voiced his desire to be tried in Lee County. More, he reiterated that choice when asked by the trial judge after the jury was selected and before it was empanelled. If, under those circumstances, the trial judge had ordered a change of venue he would have committed plain error in violation of the vicinage rights of the accused. * To complain now that the

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* The same provision of the Florida Constitution cited earlier, Article I, Section 16, 25A FSA 347, provides that the accused shall have the right to "a speedy and public trial by impartial jury in the county where the crime was committed." (Emphasis supplied).

Court should have changed the venue of the trial despite those circumstances is plainly frivolous.

Similarly, the claim that the trial court denied the Petitioner a fair trial because he, the Petitioner, was allowed to hold a press conference at his own insistence, expressly asserting First Amendment rights, is equally frivolous. While Sheppard v. Maxwell does contain language to the effect that a trial court may reasonably regulate public expressions by those directly involved in a criminal proceeding, it would be a strained application indeed to hold that an accused may, after conviction, take advantage of his own behavior as the basis of a claim that he was denied a fair trial, especially when he never

denied his guilt at trial and, in fact, testified in detail to the jury concerning his commission of the crime. Moreover, while the Petitioner's trial apparently attracted considerable attention, there is no suggestion that the trial itself was conducted in a circus atmosphere with a protesting defendant as in Sheppard.

With regard to the management (or alleged mismanagement) of the proceedings by the trial judge, one of the Petitioner's claims relates to an exchange which occurred at the conclusion of the testimony of eleven year old Billy Arthes. As the witness was leaving the courtroom the Petitioner apparently gave him a piece of candy and said "I love you Billy, Good bye." The jury was excused for a recess and the following dis-

cussion ensued:

THE COURT: All right, Come up. Arthur, you cheated.

THE DEFENDANT: I hope you are not upset with me. I had to give him a piece of candy. I love that kid.

THE COURT: You got your kicks in.

THE DEFENDANT: I love that kid really.

THE COURT: If you fool with me again like that you are going to watch the rest of the trial with your mouth taped, your hands taped and your feet taped standing in the corner.

THE DEFENDANT: I told you this morning ---

THE COURT: You won this race. I am going to win the next one. Don't do it again; is that fair?

THE DEFENDANT: Okay.

THE COURT: I will let you participate so long as you follow my rules.

THE DEFENDANT: If I have any other indications. I will advise you ahead of time.

THE COURT: Don't break them.

THE DEFENDANT: I will advise you ahead of time.

THE COURT: Do. Normally if you have a request then come up and I will rule on it.

MR. SIMPSON: Your Honor, may I --

THE COURT: Because the recourses aren't enjoyable. You are going to look funny with tape around your damned face and your hands tied.

THE DEFENDANT: I gave him a piece of candy.

THE COURT: I know. I was waiting. I didn't know what you were going to pull.

MR. SIMPSON: Your Honor, can - -

THE COURT: What?

MR. SIMPSON: Since the outset of this case I have requested a number of occasions that court not allow Arthur Goode to participate in the trial in the nature in which he is doing and the Court has ruled against me each time. I think, though the case has gotten to such a point that it is almost becoming that of a circus atomsphere on the part of Mr. Goode. Because of that I would ask for a mistrial. I think the court was wrong in permitting the press conference. I think the court was wrong permitting Mr. Goode to cross examine the witnesses inasmuch as he is not trained in law.

We have been appointed to represent Mr. Goode. We are doing no good for Mr. Goode by his actions, and I would ask that the court grant my motion.

THE COURT: What is good, Joe? What is good?

MR. SIMPSON: We are not able to properly represent him.

THE COURT: What is proper representation? What does that mean? Does that mean looks? Does that mean what you think is right?

MR. SIMPSON: See that he gets a fair trial, but with his own actions, he cannot be assured of a fair trial.

THE DEFENDANT: I want to represent myself.

THE COURT: Arthur is competent. Your function is to advise him. If he listens to that advice and ignores it then it's his damned trial, he can do what he wants.

(Emphasis Supplied)

Petitioner asserts that the judge's profane reference to him and to the trial itself operated to deny him a fair trial. However, the exasperating circumstances in which those references were made, and the fact that they occurred out of the presence of the jury, completely undermine the claim. Indeed, the fact that the Petitioner is forced to rely upon that incident as the primary basis of his argument concerning the conduct of the judge is indicative, in itself, that the trial was managed as fairly as the Petitioner's own behavior would permit.

A second challenge concerning the conduct of the trial judge (a claim advanced orally at the hearing on February 23, 1982) is that the Petitioner was denied a fair trial when the judge called the three court appointed

psychiatrists to testify during the penalty phase of the trial without calling the fourth psychiatrist who had previously testified, at the behest of Petitioner's then counsel of record, during the pretrial competency hearing. This claim can only be characterized as a grasp at a straw. First, the Petitioner himself was at liberty to call the fourth psychiatrist, or anyone else, and chose not to do so. Second, the trial court understandably felt an obligation in the circumstances of this case to call the court appointed experts because of the statutory reference to "extreme mental or emotional disturbance" as a mitigating circumstance (Florida Statute 921.141(6)(b)), and there simply cannot be any showing of prejudice or unfairness in that pro-

cedure. That he attempted to make a case and might have made a better one did not harm the Petitioner in any legal sense.

The final aspect of the Petitioner's claim that he was denied a fair trial is the assertion that he was incompetent; and that claim, as a practical matter, is at the heart of all the others.

It is settled law, of course, that the conviction of an accused person while he is legally incompetent violates substantive due process; and when circumstances arise which create a bona fide doubt concerning the competency of the accused, procedural due process and the right to a fair trial necessitates a hearing to resolve that doubt. Pate v. Robinson, 383 U.S.375, 86 S.Ct. 836 (1966). But Pate was fully complied

with in this case. The trial court appointed three psychiatrists and conducted a pretrial competency hearing. Each of those psychiatrists testified that the Petitioner was competent. Moreover, each of them examined him a second time and reaffirmed their view with the added opinion that he was competent at the time of the offense. The Petitioner's only argument now -- and the only one he could possibly have left -- is that those physicians were wrong; that they were not specialists in treating pedophilia; and that additional psychiatrists can be found who will express contrary opinions. The Respondent replies that additional psychiatrists can be found who will express the same opinion; and both sides are almost surely correct in those assertions. The point is, however,

that there was simply no violation of any of the rights of the accused during the proceedings in the state courts. A Pate hearing was held. Qualified psychiatrists testified, three to one in favor of competency. The trial court weighed the evidence and found the Petitioner to be competent. That finding was reviewed and affirmed on appeal.* It was, and still is, clearly supported by the record. Accordingly,

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* It is also pertinent to note that the determination of competency, a factual issue, forecloses relitigation here under Sumner v. Mata, _____U.S._____, 101 S.Ct. 764 (1981).

the Petitioner's renewed claim of incompetency is simply without merit.

At the hearing conducted on February 23, 1982, the Petitioner orally expanded his fair trial claims to include a contention that he was denied a "fair hearing" during the post conviction, collateral review proceedings in state court because no evidentiary hearing was held. However, even assuming that the Constitution requires the state to afford post conviction remedies beyond an appeal - - which it does not- - there was no violation here for the same reasons this court has determined that no evidentiary hearing is justified in these proceedings.

Finally, at least with respect to the claims relating to the trial on the issue of guilt or innocence, and

even assuming that some or all of those claims have merit - - which they do not - - all but the claim of incompetency would be harmless beyond a reasonable doubt with the meaning of Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967). This Petitioner confessed to the jury. He freely and voluntarily admitted his guilt in horrible detail. (See Appendix). Furthermore, it should be noted that his admission of guilt was corroborated by eyewitness identification placing him at the scene of the crime in the company of the victim.

3. Misapplication of the death penalty statute. The claims in this group involve alleged denials of due process in violation of the Fifth Amendment as well as the alleged imposition of cruel and unusual punish-

ment in violation of the Eighth Amendment. The various contentions are: (a) That the prosecutor, without correction by the Court, erroneously described the burden of proof concerning the establishment of mitigating circumstances; (b) That the trial judge incorrectly limited the jury's consideration to the mitigating circumstances enumerated in the statute; (c) That the trial judge considered in imposing sentence a non-statutory aggravating circumstance; (d) That the trial court failed to recite in his findings the Petitioner's mental disturbance as a mitigating circumstance; (e) That the trial court improperly found the Petitioner's offense to be atrocious; (f) That the trial court improperly admitted hearsay evidence concerning the Petitioner's conviction of murder

in Virginia; and (g) That the Petitioner received ineffective assistance of counsel during the penalty phase of the trial.

During the course of his argument to the jury at the conclusion of the penalty phase of the trial the prosecutor made the following remarks:

> His Honor is going to read to you and instruct you as to the law and he is going to talk to you about aggravating and mitigating circumstances. And he will tell you that the aggravating circumstances, and I'm going to argue some of them, which I think the State has proven, that the State must prove to you before you can say 'this is an aggravating circumstance,' the State must prove to you beyond a reasonable doubt that you are convinced that I have proven it is an aggravating circumstance. Once you have reached that decision, then you can consider it and give it whatever weight you so desire.

> Mitigating circumstances, and this is probably one of the only times there is any burden on the defendant in a criminal trial because mitigating circumstances can be presented - - they don't have to be proven to you beyond a reasonable doubt. There is a different standard. I believe it is - - I may be incorrect, but I believe it is the preponderance of the evidence. I may be wrong,but it is less than the State.
>
> And then the beauty of it is that you have some discretion but you don't have discretion. You must hear them. You weigh them. You find out if it is aggravating or mitigating and you give it the weight that you deem it appropriate.

The Petitioner complains that the remark attributing to him the burden of establishing mitigating circumstances by a preponderance of the evidence was a misstatement of the law. The claim fails, however, for several reasons. First, it is not at all clear that the

prosecutor's statement was wrong. The statute (Florida Statute 921.141 (2)(b)), constitutionally approved by the Supreme Court of the United States in Proffitt v. Florida, 428 U. S. 242 96 S. Ct. 2960 (1976), expressly provides that the jury recommendation as to the sentence must include a determination as to "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist," and, as the Respondent rhetorically asks, how can a mitigating circumstance outweigh anything unless established by a mere preponderance of the evidence on the point? Secondly, Petitioner's counsel made the same remark to the jury, i. e., "we only have to show these [mitigating circumstances] by a preponderance of the evidence," and no objection was ever made by anyone. Further, the Supreme Court of

Florida has refused to consider the issue because of that failure * and the Respondent now asserts the waiver doctrine of Wainwright v. Sykes, 433 U.S., 72, 97 S.Ct. 2497 (1977) as a bar to consideration of the claim. Clearly, therefore this contention is without merit and could not now be considered in any event.

The Petitioner next claims that the instructions the trial judge gave to the jury limited their consideration, unconstitutionally, to the mitigating circumstances enumerated in the statute contrary to Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 295 (1978), and Washington v. Watkins, 655 F. 2d 1346 (5th Cir. 1981).

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* See the Court's opinion appeal from the denial of Petitioner's post conviction petition in the trial court, Goode v. State, 403 So. 2d 931, 932 (1981).

After instructing the jury concerning the aggravating circumstances listed in the statute, prefaced by the admonition that "the aggravating circumstances which you may consider <u>are limited</u> to such of the following as may be established by the evidence, the trial judge continued his charge as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: [The court then read the mitigating circumstances].

It is noteworthy, therefore, that while the court's charge specifically limited the jury to the aggravating circumstances listed in the statute,

the instructions did not expressly so limit the jury's consideration of mitigating circumstances. Nevertheless, in Washington v. Watkins, supra, the Fifth Circuit held, in discussing an almost identical jury instruction, that "a reasonable juror might well infer from this parallel syntax that the enumerated factors - - both aggravating and mitigating - - were the sole factors that he was permitted to consider . . ." 655 F. 2d at 1370. It does not follow, however, that such a construction of the court jury charge affords the Petitioner any comfort in this case.

In Lockett the precise holding of the Court was stated in the following terms (438 U.S. at 604-605, 98 S.Ct. at 2964-2965).

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
>
> * * * * * * * *
>
> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proferred in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the

> Eighth and Fourteenth Amendments.
>
> (Emphasis supplied)

Similarly, in Washington v. Watkins the Court said (655 F. 2d at 1973).

> Washington's sentencer was precluded from considering as mitigating factors all but two of the aspects of Washington's character and record and the circumstances of the offense that he proferred as a basis of a sentence less than death.
>
> (Emphasis supplied)

Thus, in both Lockett and Washington the defendant was precluded by the governing statute or the court's instructions from relying upon and urging mitigating circumstances which he had specifically "proffered" to the sentencing authority. In this case, by contrast, no such thing occurred. Petitioner's counsel urged three mitigating factors - - the Petitioner's age, his

mental or emotional disturbance, and impairment of the Petitioner's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law -- all of which are listed in the statute which was read to the jury as a part of the Court's charge. Petitioner was not precluded nor was the jury inhibited from considering each and every mitigating circumstance he proffered in the case. There was, accordingly, no violation of Lockett or Washington v. Watkins.

There is, in addition, an alternative reason undermining Petitioner's reliance upon Lockett and Washington v. Watkins, namely, the lack of objection to the court's instructions during the trial followed by a refusal on the part of the Supreme Court of Florida to

to consider the issue on collateral review precisely because it had not been asserted before. Goode v. State, 403 So. 2d 931 (Fla. 1981). There is therefore, absent a showing of "cause" and "prejudice," a valid waiver of the claim pursuant to Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). In Washington v. Watkins the Court held that Wainwright v. Skyes did not preclude review because the state had not asserted the bar in the district court and because the Mississippi Supreme Court had not applied its contemporaneous objection rule, choosing instead to address the merits of the Issue. Neither of those circumstances is present here. The Respondent is emphatically asserting Wainwright v. Sykes, and as noted, the Supreme Court of Florida applied its

contemporaneous objection rule and refused to consider the claim on its merits. If there ever was a viable claim under Lockett, it has been waived.

The Petitioner's claim that the trial judge improperly considered a non-statutory aggravating circumstance in imposing sentence is simply not supported by the record.

Specifically, as required by the statute, Florida Statute 921.141 (3)(a) and (b), the trial judge made specific findings that three of the statutory aggravating circumstances has been proven beyond a reasonable doubt, namely, that the Petitioner was previously convicted of another capital felony involving the use or threatened use of violence to the person; that the instant

murder was committed while the Petitioner was engaged in the commission of a kidnapping; and that the offense was especially heinous, atrocious and cruel. He then said: "The court finds no other aggravating circumstances to have been proved beyond and to the exclusion of every reasonable doubt." The judge then made his findings concerning the mitigating circumstances, but concluded that they were outweighed by the aggravating factors, and he imposed the sentence of death after which he instructed counsel to prepare and file an appropriate notice of appeal. After all of that had been accomplished, the court said:

> In closing, I want to address myself to counsel Smith's remarks for just a moment. The question of why should this man be exe-

cuted for what he has done is a question that the court has wrestled for several days and has carefully considered the circumstances but I have to be able to answer to myself why should I invoke the awesome punishment of death. Could not something be learned from Arthur? Am I not doing as I have seen and heard many do and merely so outraged by the activities that he has done that possibly my reason and judgment are blurred? I believe not.

If organized society is to exist with the compassion and love that we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no longer help, we can no longer rehabilitate and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate.

Philosophically I believe that in certain limited instances we should do that. In this particular

> case that is my opinion and that is my order, and the only answer I know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, main, torture or harm another human being, and as you said in trial, Arthur, maybe I don't know who we blame. God, forgave you of those desire or something, in your environment that has made you have them, and whoever is to blame is beyond the power of this court.
>
> You have violated the laws, you have had your trial and I am convinced that the punishment is just and proper, and truthfully, may God have mercy upon your soul.

Taking these remarks completely out of context, the Petitioner now argues that the judge improperly considered a non-statutory aggravating factor, i.e., the possibility that the Petitioner might kill again in the future. As demonstrated

the record simply does not support this claim. The sentence was properly imposed in the structured manner the statute requires. The court's subsequent remarks were made in response to counsel and in philosophical justification of capital punishment both generally and as applied in Petitioner's case. It would be a gross distortion to conclude on that basis that the statute was not obeyed.

The Petitioner complains that the trial judge failed to find a mitigating circumstance, namely, that the capital felony was committed while the Petitioner was under the influence of extreme mental or emotional disturbance. This claim is also without merit. Although the trial judge had acted to bring to the jury's attention the

testimony of the three court appointed psychiatrists that Petitioner was suffering from a mental or personality disorder, the fact is that two of the three opined that the Petitioner had not acted under the influence of extreme mental or emotional disturbance within the meaning of the statute.

It may be that the judge considered the Petitioner's mental condition as a mitigating circumstance and simply overlooked reciting it as such in his findings; or it may be that he did not feel that the standard of "extreme" mental disturbance established by the statute existed in the evidence. In either case the Petitioner has no basis for complaint because if it was the former, he was not harmed (he was, in fact, benefitted); and if it was the latter, the judge was clearly supported by the

greater weight of the evidence.

The Petitioner's remaining claims relating to the penalty phase of his trial are barely worthy of any discussion at all. He says the Court was unjustified in finding his offense to be especially heinous, atrocious or cruel. A reading of Petitioner's own testimony at trial provides a sickening answer and complete refutation. (See Appendix). He says the court considered hearsay testimony to establish his prior conviction in Virginia; but the record shows that the evidence was not hearsay; that no error of constitutional dimension was committed even if it was; and that, as shown by his own petition in this court, the Virginia conviction is undisputed in any event. Finally,

he says he received ineffective assistance of counsel during the penalty phase, but a review of counsel's argument clearly reveals that he did the best any lawyer could have done under the circumstances. *

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* The Petitioner, having testified during the first stage of the trial, also exercised his right to testify during the penalty phase. His testimony excluded the following:

> "Going into the other things, the way I feel after I had committed this crime. I am extremely proud of myself knowing that I, Arthur Goode, III, had murdered Jason Verdow for the fun of it, so to say. For reasons I have explained -- well, which I will. Also, I have absolutely no remorse whatsoever towards Jason.
>
> "Also, I'm extremely proud knowing that I, Arthur Frederick Goode, was the last person to see Jason alive or any of the other victims which I have murdered. Also, that I was the last person who heard the sweet, sexy voice. I was also the last person who had kissed his precious warm lips before I, Arthur Goode, had

4. Improper consideration of confidential information by the Supreme Court of Florida during its review of the sentence. In Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977), the Court held that due process was violated

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murdered him. These are some of the things I'm proud of."

Then, his argument to the jury at the conclusion of the penalty phase of the trial, consisted of the following:

> "THE DEFENDANT: Yes, those pictures that were sent around through the jury to see, which the State-- that the Court had made, I think those pictures there are a pretty good indication that this crime is extremely cruel and I think that indicates right there that I should get the death penalty.
>
> "Furthermore, that it is a premeditated matter. The fact that I went to the drug store on the day before and got the dope and prepared for this crime, except I didn't know just when I would meet such a boy-- but that's the opinions I have, and I think I should get the death penalty.
>
> "That is all I have, Your Honor."

when a death sentence was imposed at least in part on the basis of confidential information in a presentence report which had not been disclosed to the defendant or his counsel.

In Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), cert. denied ____U.S. ____, 102 S.Ct. 542 (1981), the Petitioner and others under sentence of death petitioned the Supreme Court of Florida for habeas corpus relief asserting that the Supreme Court itself had violated Gardner during the process of appellate and sentence review by seeking and considering psychological reports and other material pertaining to offenders under sentence of death. The Florida Supreme Court rejected the claims and the Petitioner now reasserts those issues here.

At least two other District Courts

have had recent occasion to consider these precise claims and have found them to be without merit as a matter of law for the reasons given in the Brown decision by the Florida Supreme Court. Foster v. Strickland, 517 F. Supp. 597, 607, (N.D. Fla. 1981) and Witt v. Wainwright, Case No. 80-545 Civ-T-GC, Memorandum Opinion of Judge Carr, May 14, 1981. * I now adopt those decisions, as well as the Brown opinion, and find that the Petitioner's numerous claims flowing from Gardner (and as asserted in Brown are all without merit.

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* The unreported decision of Judge Carr is attached to this opinion as an additional Appendix.

5. Denial of effective assistance of counsel on appeal. The Petitioner claims that his appellate counsel was ineffective because he did not raise, on appeal, three of the issues already discussed in this opinion.

This claim was still pending in the Supreme Court of Florida at the time the petition was filed in this Court, but was decided by the Florida Supreme Court just prior to the hearing I conducted on February 23, thus exhausting Petitioner's state remedies concerning the issues presented.*

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* A copy of the opinion of the Supreme court of Florida is attached as a third Appendix to this opinion.

The claim is utterly without merit because, as already determined, the issues which Petitioner says his appellate counsel should have argued were themselves without merit. The additional observations made by the Supreme Court of Florida lend further weight to that conclusion. *

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* The Court found, for example, that contrary to Petitioner's assertion in his petition and brief, some of the issues he claims to have been overlooked by his appellate counsel were not overlooked at all, and were in fact argued in the brief on direct appeal. The briefs on that appeal (which have been filed as a part of the record in this case) fully support that finding and conclusion.

C. CONCLUSION

There is no issue of fact concerning any of the Petitioner's many claims. All of them can be determined, as they have been, on record presently before the court. An evidentiary hearing is unnecessary; and since none of the claims have merit, it follows that the petition for a writ of habeas corpus should be, and is, DENIED and DISMISSED. The Clerk is instructed to enter judgment accordingly.

Further, since the petition has been disposed of, the motion for stay of execution is also DENIED and DISMISSED.

Given the nature of the case a certificate of probable cause for appeal will be separately entered and filed with this opinion.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 25th day of February, 1982.

S/William Terrell Hodges
UNITED STATES DISTRICT JUDGE